3, JULY 2023

CIVIS LETTER N°2

CIVIS SHORT-TERM MOBILITY COURSE
SOCIETY, CULTURE, HERITAGE

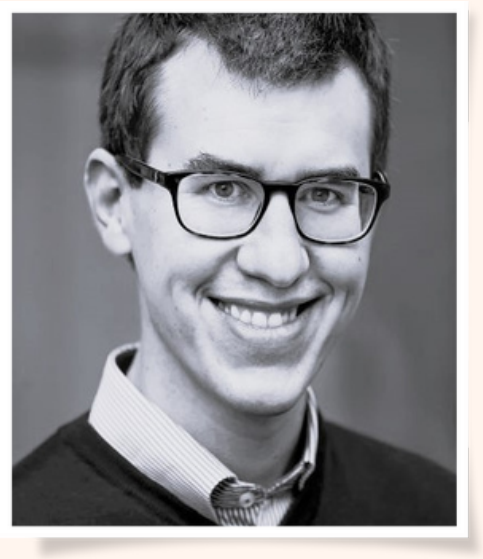
GOVERNING IN TIMES OF CRISES

CIVIS A European Civic University

amU Aix Marseille Université

TABLE

EMMANUEL SLAUTSKY



I am very pleased to present this flipbook, which is the outcome of the 2023 edition of our CIVIS summer school titled "Governing in times of crisis", a summer school organised at the initiative and in collaboration with my colleagues Ariane Vidal-Naquet and Katerina Iliadou. The 2023 edition of the summer school was held at the Université libre de Bruxelles. CIVIS is Europe's Civic University Alliance, formed by 11 leading research higher education institutions across Europe: Aix-Marseille Université, National and Kapodistrian University of Athens, University of Bucharest, Université libre de Bruxelles, Universidad Autónoma de Madrid, Sapienza Università di Roma, Stockholm University, Eberhard Karls Universität Tübingen, University of Glasgow, Paris Lodron University of Salzburg and University of Lausanne.

The overall aim of the 2023 edition of the "Governing in times of crisis" summer school was to help participants becoming able to critically discuss the role played by different types of accountability and oversight mechanisms in the context of crisis decision-making. Accountability is essential from a rule of law perspective because it helps keeping the government in check, thereby preventing governmental abuse against citizens.

To achieve this aim of the summer school, we first undertook to bring conceptual clarity in relation to notions such as crisis, emergencies and accountability. We then focused on the role of certain actors such as parliaments, judges, experts and civil society, in holding the government to account in times of crises. In doing so, we also reflected on the differences between different types of crisis from a rule of law perspective. Several of the contributions presented during this summer school are reproduced hereafter, together with some photographs and other memories from the event.

Beyond the active role played by Ariane Vidal-Naquet and Katerina Iliadou, the 2023 edition of the summer school and the preparation of this flipbook would not have been possible without the participation of my colleagues at the Université libre de Bruxelles (Julien Pieret, Thibault Gaudin and Camille Lanssens), the entire Aix-Marseille Team (including Charlotte Largeron who has been in charge of the preparation of this flipbook), all the speakers and panellists present during the summer school, as well as, of course, the more than 20 students coming from the different CIVIS universities who participated in the event. I would like to thank the all very much: it has been a great pleasure to welcome them in Brussels in July 2023!

PROGRAM
GOVERNING IN TIMES OF CRISES

"Governing in times of crisis" is a summer school that aims to discuss, from a legal perspective, how governments handle situations of crisis of different natures, and how they are held accountable in such circumstances.

In its 2023 edition, the summer school aimed at providing participants with an understanding of topics such as how the concept of "crisis" should be defined, the extent to which emergency regimes can be used to respond to different types of crises, and how different types of oversight and accountability mechanisms such as courts, parliaments and civil society actors can contribute to holding decision-makers accountable in a crisis context, thereby preserving the fundamentals of the rule of law.

The summer school was built around a mix of lectures, seminars, and presentation of case-studies.

Main topics addressed

* The concept of crisis
* The law of emergency regimes
* The role of courts in crisis situations
* The role of Parliaments in crisis situations
* The role of civil society actors in crisis situations

Organising committee

Université libre de Bruxelles
* ***Emmanuel Slautsky*** (Associate Professor of Public Law and Comparative Law)
* ***Julien Pieret*** (Professor of Public Law)
* ***Thibault Gaudin*** (Postdoctoral researcher)
* ***Camille Lanssens*** (PhD student)

Aix-Marseille Université
* ***Ariane Vidal-Naquet*** (Professor of Public Law)
* ***Priscilla Jensel-Monge*** (Lecturer in Public Law)

National and Kapodistrian University of Athens
* ***Ekaterini Iliadou*** (Assistant Professor of Public Law)

In addition, guest speakers from Université libre de Bruxelles and other CIVIS member universities were invited to contribute to the summer school in the form of lectures or participation in panel discussions and seminars at the Université libre de Bruxelles. Roundtables with relevant stakeholders were also included in the program.

CRISES AS A CHALLENGE TO THE RULE OF LAW

OPENING SPEECH TO THE 2023 EDITION OF THE CIVIS BIP "GOVERNING IN TIMES OF CRISIS" – 3 JULY 2023

EMMANUEL SLAUTSKY

Associate Professor, Université libre de Bruxelles (ULB)

The notion of "crisis" is not an easy one to define. The word "crisis" is used here to refer to situations or times that are extremely dangerous or difficult. Crises are turning points, at which things can evolve in very different ways. Crises are often equated with emergencies, although there is a distinction between both types of situations that needs to be maintained. Examples of situations that have been labelled as crises in recent years are the financial crisis of 2008, the 2015 migration crisis, the Covid-19 pandemic of 2020 and 2021 and the ongoing climate and environmental crisis.

From a legal perspective, crises and emergencies are often associated with the idea that ordinary law must be set aside, at least in part, to address the threat. In this sense, crises constitute challenges to the rule of law.

This is because the rule of law requires that the state should regulate behaviours only through prospective and published norms of general applicability, the enforcement of which is the responsibility of independent courts. Yet, crises challenge the rule of law because they may call for extraordinary measures to be adopted by governments, which depart from the normally applicable rules, and because they tend to be associated with executive discretion and lessened courts' scrutiny. For example, in a time of war, it is common for the executive to take the lead in reacting to the threat through the exercise of broad discretionary powers, while fundamental rights such as the freedom of citizens to circulate are restricted or suspended, and the courts exercise less scrutiny over executive action.

However, this notion that ordinary rules and ordinary rule of law guarantees should be set aside in any situation labelled as a crisis or an emergency should not go unscrutinised. Surely, it is the case that extending the powers of the executive, for example, to face a grave and temporary threat can be justified, because the executive is institutionally better equipped than Parliaments to react quickly to fast evolving situations. This can be the case in the face of a war or in the face of a pandemic, for example. In other words, there may be good functional reasons to empower the executive and derogate from ordinary law when a grave threat arises, in order to avoid this threat or its more severe effects from materialising.

Yet, at the same time, some situations labelled as crises or emergencies do not justify that ordinary law and ordinary guarantees should be set aside in order for governments to face the situation. For example, while some scholars have argued that ordinary democratic arrangements and rule of law requirements should be – at least in part and for a period – set aside to tackle the emergency of climate change – I am thinking of participation rights, access to justice, property rights for example –, this claim has not been universally accepted[1]. On the contrary, facing successfully a challenge such as climate change requires a systemic transformation of our societies and ways of life in a way that cannot happen through far reaching top down measures adopted by an executive temporarily empowered to do so. Such change must rather rely on a coordinated and widely shared commitment of all levels of government as well as within society to the transition. This need for comprehensive and sustained mid- and long term action would point to the need not to discard too hastily preexisting rule of law and democratic arrangements, even from the perspective of achieving the objective of limiting climate change.

[1] J. Wong, "A Dilemma of Green Democracy", Political Studies, 2016, 64/1S, 136-155; C. Armeni and M. Lee, "Participation in a time of climate crisis", Journal of Law and Society, 2021, 48, 549-572.

This said, even when a situation does justify to set aside ordinary law and to empower the executive, this can happen to very different degrees and in different forms, with different implications from the perspective of rule of law requirements. Jeff King, for example, distinguishes between three models of emergency powers in his work on the Covid 19 pandemic[2].

The first model that Jeff King identifies is the neo-roman or constitutional dictatorship model. Under this model, there is a disjunction between the agency declaring a situation of crisis or an emergency (e.g., the legislature) and the person exercising the powers (e.g., the President). The executive receives large and almost uncontrolled powers to react to the threat, but he does so at the request of the people or its representatives. Accountability of the executive to the people or to parliament exists ex ante and ex post, but not during the exercise of the emergency powers. The delegation of powers is only valid for a limited period of time. The idea behind this model, inspired by Roman Antiquity, is to have some sort of dictator in charge for a short time, with the main task being to address the existing threat. From a legal perspective, an approximation of this model exists in contexts where the Constitution contains broad emergency powers than can be mobilised by the executive under conditions specified under the relevant provision. An example of this is article 16 of the French Constitution.

The second model is the extra-legal measures model. It is a model where the executive acts outside the law to react to crises or emergencies. This model assumes that the law can never realistically constrain the executive in a period of emergency, even when it purports to do so. Emergency situations cannot be legally regulated. It is a model than can be traced back to Carl Schmitt. Some of the proponents of this model, however, also come from the liberal tradition and they argue that it is best to leave outside the law measures adopted in times of emergency, so that it is clear that they remain exceptional measures that are not acceptable under ordinary conditions of legality.

[2] J. King, "Emergency Powers in National Legal Responses to Covid-19: a Global Overview", in J. King and O. Ferraz (eds.), Comparing Covid Laws: A Critical Global Survey, Oxford, Oxford University Press, forthcoming.

The third model identified by Jeff King can be called the 'business as usual' model or 'rule of law' model. This is a model in which the regular civil society institutions continue to operate despite the crises or the emergency. Law and legal accountability structures remain in place, although they are adapted to face the existing emergency. Additional delegations of powers, for example, are made by the legislature to the executive to face the emergency and further restrictions to fundamental rights are rendered possible to address the threats. However, there is no formal departure from the Constitution and the law that normally applies. Critics of the 'business as usual' model contend, however, that the adaptations of the legal system decided to face the emergency have a bigger risk of becoming permanent than under the first two models. This is because there would be no clear demarcation between what is ordinary and what is extraordinary, between the norm and the exception.

During the Covid-19 pandemic, there has been much discussion worldwide as to whether the pandemic had led to unleashing unconstrained executives for the sake of the protection of public health, thereby undermining democracy and the rule of law.

As a starting point, I would argue, however, that there were good functional reasons to allow the executives to be on the frontline in the adoption of the health measures taken to fight the pandemic, in particular at times where the virus was not well-known yet and the situations was fast evolving. This does not mean that the executive should have been entirely free in its handling of the pandemic, without any degree of accountability. However, fortunately, although abuses have existed, this has not been the case either in practice. For example, data collected through an international comparative project called Lex-Atlas : Covid 19 that covers the reaction of about 45 states to the pandemic shows that a significant majority of states have reacted to the pandemic by following some version of the 'business as usual' model that was alluded to before, rather than the constitutional dictatorship or the extra-legal measures model[3]. This means that constitutional provisions were not suspended and institutions such as courts and parliaments kept operating in most of these states during Covid-19, although with some adaptations and with the executives obtaining significant additional powers to react to the pandemic.

[3] Oxford Compendium of National Legal Responses to Covid-19, available at: https://oxcon.ouplaw.com/home/OCC19

These additional powers have been awarded to the executive either through Covid-specific legislation or through the activation of preexisting statutes, with variable degrees of parliamentary scrutiny and courts oversight on the enacted delegations. This observation therefore means that most of the states covered in the comparative study did not feel they had to overthrow their constitutional order in order to face the threat caused by the pandemic. Rather, they purported to stay within the confines of their respective constitutions to address the challenge of Covid 19. Similarly, only a minority of the states parties to the European Convention on Human Rights decided to activate article 15 of the Convention in the early days of the pandemic. Under article 15 of the European Convention on Human Rights, derogations to the rights recognised by the Convention are possible in times of war or other public emergency threatening the life of the nation. The enacted measures must notably remain proportionate to the threat.

In sum, crises have the potential to undermine the rule of law when they lead governments to set aside fundamental rights and ordinary legal guarantees available to the citizens for the sake of facing a grave and imminent threat. Crises are therefore situations where fears of executive abuse and weakened fundamental rights loom large, sometimes for good reasons. The failed coup d'état of 2016 in Turkey, for example, has eventually led to reinforcing the sitting power and triggered widespread abuse against journalists, academics, judges and dissidents. Yet, legal systems can react to crises in a variety of ways, not all of which requiring a full departure from ordinary law and the recourse to some form of a state of exception. This points to the need for a contextual and ad hoc assessment of how states react to a situation of crisis, which would carefully assess the degree to which rule of law requirements should be adapted or set aside for the greater good, and the degree to which they should not in order to prevent abuse from materialising.

ARIANE VIDAL-NAQUET

Professor, Aix Marseille Univ.

UNDER WHAT CONDITIONS IS THE STATE OF EXCEPTION COMPATIBLE WITH THE RULE OF LAW?

In this short paper, I'd like to discuss the question of the compatibility between state of exception and Rule of law in the legal discourse. More precisely, the question is « under what conditions is the state of exception compatible with the Rule of law? ».

A - To begin with, we shall remark that this idea of a compatibility between state of exception and Rule of law has emerged in the political sphere.

For example, in France, President François Hollande has explained during his speech after the 2015 attacks and the implementation of the state of emergency, that "the state of emergency is not a state of exception. It is part of the Rule of law"[1]. His Prime minister, in a speech, has maintained that "the state of emergency is fully within the Rule of law"[2]. Another Prime minister had explained that "the state of emergency is not a state of exception. It is constitutive of the Rule of law"[3].

More recently, in the National Assembly's information report on the Rule of law in the context of health emergencies, filed in 2021, it is pointed out that "health crisis did not create unprecedented situations in terms of respect for the Rule of law". Rather, it has acted it as a "stress test" for the rule of law[4].

[1] François Hollande, Speech of September 9, 2016 on "Democracy in the face of terrorism".

[2] Manuel Valls, Declaration on the bill aiming to include the state of emergency and the forfeiture of nationality in the Constitution, at the National Assembly on January 27, 2016.

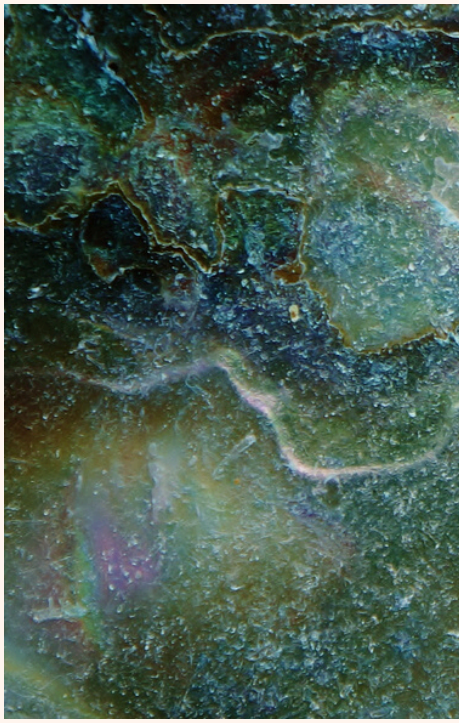
[3] Bernard Cazeneuve, interview, « L'état d'urgence ne peut pas être un état permanent », Le Monde, July 21, 2016.

[4] Information report no. 4616, tabled by the European Affairs Committee relating to the rule of law in the context of states of health emergency, October 28, 2021.

In legal discourse, the evolution seems to be the same. Crisis regimes are traditionally discussed in books on fundamental rights and freedoms as an illustration of the influence of exceptional circumstances on their exercise. Books on general public law, and constitutional law in particular, deal more rarely with states of crisis. In most cases, they are presented as regimes that do not constitute deviations or exceptions to the Rule of law but, on the contrary, sometimes as "challenges" or "trials", sometimes even as some "proofs" of the Rule of law[5].
That would mean that the Rule of law is able to foresee and plan cases in which there would be no law, or, more precisely, there would not be the same law as in ordinary times. In other words, state of exception would be the sign of the "strength of the Rule of law" because this latter is able to plan it. That's what I'd like to discuss: the idea that the Rule of law has managed to "domesticate" or "tame" the state of exception.

First, I'd like to point out a semantic shift, which is also a conceptual shift, from « state of exception » to « regimes of exception ». Some authors have underlined that, from a historic point of view, the state of exception, I.E a total suspension of the law and the reign of the arbitrary – model no. 2 as identified by Emmanuel Slautsky in his paper – has been gradually replaced by legal regimes of exception, that themselves provided for their own removal in certain circumstances. In other words, we are witnessing a kind of "discursive disappearance" of the state of exception. I mean that in legal discourse, the expression "state of exception" is replaced by "regimes of exception" that can take various – and rather euphemistic – denominations: crisis regime, state of siege, regime of full powers, etc. These "regimes of exception" seem more harmless because, precisely, these are « regimes » - that means they are regulated by law.

Secondly, this disappearance goes hand in hand with the widespread adoption of Rule of law as the ultimate value in both political and legal discourse. We all know how difficult it is to define the Rule of law, which boundaries seem to be widening as its success grows. Nevertheless, we are witnessing a veritable "success story" of the Rule of law, as the notion has become such an integral part of legal discourse and positive law, both national and international, and especially European[6]. So, it seems that as Rule of law progresses, state of exception disappears, replaced by increasingly varied "crisis regimes".



[5] I think that research remains to be done on the way in which law books, with an educational vocation, present the state of exception. I think it is a valuable reflection of the way the legal doctrine conceives the state of exception, that may largely contribute to the trivialization, acceptance and legitimization of the latter.

[6] As stipulated in the Preamble and Article 2 of the Treaty on European Union, the rule of law is one of the founding values common to the Member States and the European Union.

B - That being said, the question of whether crisis regimes are compatible with the Rule of law calls for clarification of the concepts I will use.

1- For my demonstration, I will use a positivist, more precisely a normativist point of view. Inspired by French professor of law, Otto Pfersmann, I will adopt a "material" approach of the Rule of law: this one can be defined as a state whose law displays a certain number of material qualities that are not related – or only indirectly – to their content, but only to the nature of the legal norm. This means that the legal norm should itself present certain qualities which are called "material qualities". To put it on another way, in this approach, Rule of law is not related to fundamental rights or to democracy, but only to a certain number of criteria relating to the legal norm itself[7]. So it's a very different approach of the one exposed by Emmanuel Slautsky in his paper.

Concerning "crisis regimes", I also propose to retain a normativist point of view and I will borrow the definition suggested by Professor Xavier Magnon : a "normative subdivision of the constitutional order in vigor, with a derogatory mode of production of norms, the norms that may be produced within this framework may intervene without restriction of the area of intervention as long as they fallow the aim that justifies the state of exception, instituted temporarily to respond to a situation that is exceptional in terms of its frequency and dramatic in terms of its intensity, in the name of an imperious superior motive"[8].

In France, crisis regimes include the full powers granted to the President of the Republic under article 16 of the Constitution, the security state of emergency issued by the 1955 statute law, the health state of emergency issues by the law of 2020 and, for some authors but the question is rather controversial, the jurisprudential theory of exceptional circumstances.

2- This being clarified, I think that the compatibility between regimes of exception and Rule of law is based on a syllogism. The reasoning is the fallowing: Rule of law is respected because it is the law that provides for regimes of exception; it is the law which therefore provides for its own exclusion. We can summarily reconstruct the reasoning in 3 steps:

1- Rule of law (A) is the submission of the state to law (B) so that A ⇒ B

2- The regime of exception (C) is subjected to law (B) so that C ⇒ B

3- Therefore, the regime of exception (C) is compliant with the Rule of law (A) that means C⇒A

This reasoning consists in concluding that a particular case (the regime of exception) is part of a general category (the Rule of law) because it shares with it a common property (it is provided for by the law). This type of syllogistic reasoning is famous, just like the one which concludes that a donkey is human, following the translating reasoning below:

[7] Otto Pfersmann, Prolégomènes pour une théorie normativiste de l'État de droit, Ius Gentium. Curitiba, vol. 7, n° 1, 2016, p. 72-104, on line.

[8] Xavier Magnon, « Le concept d'état d'exception Une lecture juridique », Revue du droit public et de la science politique en France et à l'étranger, 2021, Numéro spécial : Les États d'exception : un test pour l'État de droit ?, p. 11-34.

1. All humans are mortal (A ⇒ B).
2. A donkey is mortal (C ⇒ B)
3. Therefore, a donkey is a human (C ⇒ A).

The second premise is true; however the conclusion is false. In my opinion, this syllogistic demonstration is transposed, even unconsciously, in the minds of those who maintain that crisis regimes are compatible with the Rule of law.

C - In a third time, I will try to identify the conditions under which crisis regimes can be compatible with the Rule of law. I suggest to identify 3 conditions: crisis regimes must be provided for by a valid / foreseeable / controllable legal norm.

1- At first, crisis regimes are rule of law-compliant if they are provided for by a valid legal norm.
I realized that very little attention is paid to this criterion in the legal doctrine, whereas it is an important question, particularly in a normativist approach, according to which each norm derives its validity from a norm that is superior to it, up to and including the norm that is assumed to be valid, i.e. the Constitution. For some exceptional regimes, the question of validity may seem easy to resolve. In France, for instance, the regime of the President full powers is expressly stated in article 16 of the Constitution which sets some (flexible) conditions of use and must be considered as valid. For others, it can be more difficult, as it can be difficult to go back to the norm deemed ultimate.

The regimes of legislative states of emergency for security and health are more complicated.

The regime of the state of emergency for security is provided for by a law adopted of the 3rd of April 1955, which derived its validity from the Constitution of 1946, i.e. from an earlier Constitution. So, the question is: is this law valid under the 1958 Constitution? The question is considered to be resolved by the theory of implicit abrogation: according to this theory, the adoption of the new Constitution entails the abrogation of any legislative norm that might be contrary to it.
But the Constitutional Council has considered that the entry into force of the 1958 Constitution did not abrogate the 1955 law, as this one was not contrary to the Constitution[9]. In fact, this reasoning may well be criticized, as far as one may be considering that, on the contrary, the enforcement of 1958 Constitution has abrogated the law of 1955. Another example is the 2020 law which has created the state of health emergency: the Constitutional Council judged that the silence of the Constitution has authorized the creation of a crisis regime, on the basis of a highly questionable reasoning[10].

Another example, more difficult: the "exceptional circumstances" regime which is presented as a jurisprudential theory, i.e. one forged by the judge. According to this theory, shaped during the First World War, exceptional circumstances can justify certain measures taken by the executive, notably an extension of the President police power.

[9] Constitutionnal Council, Decision n° 85-187 DC, January 25, 1985, Law relating to the state of emergency in New Caledonia and dependencies.

[10] Constitutionnal Council, Decision n° 2020-800 DC, May 11, 2020, Law extending the state of health emergency and supplementing its provisions – see A. Bachert-Peretti, X. Magnon, A. Vidal-Naquet, T.S. Renoux, «État d'urgence sanitaire : traiter l'exception avec les outils de la normalité ? », Revue française de droit constitutionnel, décembre 2020, n° 124, p. 905-935.

This theory was applied to the decree of March 16, 2020, which imposed confinement because of COVID-19, outside any legal framework authorizing it[11]. Here again, little attention has been paid to the question of the validity of this jurisprudential crisis regime, and in particular whether the judge is empowered by the legal order to forge such crisis regimes.

2 - Secondly, crisis regimes are Rule of law-compliant if they are provided for by a legal norm with a number of formal qualities: clarity and predictability – two principles that go hand in hand: because the norm is clear, it is foreseeable, and it is therefore easy to anticipate the behaviors it is intended to govern.

However, legal discourse does not question the clarity and foreseeability of legal norms providing for crisis regimes. The more often, legal norms regimes are very elliptic, as well concerning the conditions of the crises or the measures likely to be adopted to face the crises. The conditions are often very vague, referring to certain circumstances (factual events, time), which will obviously have repercussions on the judicial review likely to be carried out. Concerning the "measures" to be taken and their accumulation, here again we can note a relative indeterminacy, for example, the article 16 of French Constitution provides for that the President shall take "all the measures that the circumstances require".

Rule of law also supposes foreseeability. To this point of view, we need to question the creation of tailor-made regimes, precisely made during the crise to deal with and then disappear.

For example, the state of health emergency regime was created in March 2020 as a provisional law: it was supposed to lapse after one year, but it was extended a first time and a second one until July 31, 2022. Another illustration, even more questionable, is the jurisprudential theory of exceptional circumstances: indeed, this regime was created after the adoption of the measures taken, since it was shaped by the judge during subsequent litigation. In this case, the crisis regime is created by the judge retroactively and covers the measures adopted before, which would appear to be completely contrary to the predictability required by the Rule of law.

3 - Thirdly, crisis regimes are Rule of law-compliant if the law can be enforced through judicial review.

Here again, this dimension is singularly absent from the legal discourse on state of exception, which tends on the contrary to legitimize jurisdictional restraint or even its disappearance. That means that the legal discourse rather tends to justify the judge's self-limitation or, even more, the absence of control. I'm not going to expand on this point here, as we discussed it last year at the previous CIVIS Summer School[12].

[11] Décret n° 2020-260 du 16 mars 2020 – voir Conseil d'État, December 22, 2020, req. n° 439800.

[12] See "Judicial Review of Crisis – A counterpoint reading" by Théo Brillanti, Xavier Magnon, Ariane Vidal-Naquet, CIVIS Flipbook 2022.

But the idea is that a jurisdictional control is required to comply with the Rule of law. This third condition raises a whole series of questions:
Which judge? is it a specific judge? The question is particularly acute in a country like France, where the administrative judge is very close to the administration, and therefore to the executive power; should the judge be specifically empowered to control exceptional regimes? or should we consider that this empowerment is implicit, and applies as it does to all other legal norms?
Finally, should the judge exercise a specific control, because we are in a state of crisis, a control that would be restricted or limited by the very nature of the state of crisis, or should he exercise a normal control, i.e. a control as in ordinary times?

In my opinion, these are fundamental questions which are as many conditions for the compatibility of crisis regimes with the Rule of law. However, these are all questions which are addressed in a particularly cautious way by the legal doctrine. As a conclusion I would say that by not asking these questions, the doctrine takes on a particular responsibility in the trivialization and acceptance of crisis regimes. As a conclusion of the conclusion, I would like to thank Emmanuel Slautsky for encouraging me to ask myself these questions and, more broadly, for the organization of this CIVIS Summer School!

The role of Courts in times of crises and the question of the effective operation of the Rule of Law

BY NATAȘA DANELCIUC-COLODROVSCHI

Associate Professor, Aix Marseille Univ.

"The rule of law is not in quarantine". This is the title that the French Minister of Justice, Nicole Belloubet, gave to her article published in the newspaper Le Monde on the 1st of April 2020[1] in response to the criticisms expressed by the parliamentary opposition and many lawyers with regard to the law of the 23rd of March 2020 establishing a new exceptional regime in France, called the state of health emergency[2]. These criticisms were mainly of two kinds. They focused first on the very significant powers that were given by the legislator to the Prime Minister, allowing him to limit the most important freedoms or to order any requisition of goods and services without any judicial authorization. Such competences can lead to serious problems in terms of respect for the principles of democracy and the rule of law.

A situation that occurred in a particular context, when the activity of the judicial system was blocked and it was almost impossible to control the legality of these very restrictive measures before the competent judges. As the first President of the Cour de cassation of France pointed out "justice was not immediately apprehended at its right place"[3], in particular because it has not been declared as a "basic necessity service". In this context, it must be noted that the second part of the criticisms relied on was totally justified[4].

France has not been a special case in this situation. Almost all European States established at that time an exceptional regime which is, according to the definition given by Professor Michel Troper, "a situation in which, by invoking the existence of particularly dramatic exceptional circumstances and the need to deal with them, [...] the application of the rules which ordinarily govern the organization and functioning of public authorities is obviously less liberal. That leads to a greater concentration of powers and to restrictions of the fundamental rights and freedoms"[5]. The role of justice in this context appears essential.

[1] Le Monde, April 1, 2020, https://www.lemonde.fr/idees/article/2020/04/01/nicole-belloubet-l-etat-de-droit-n-est-pas-mis-en-quarantaine_6035194_3232.html.

[2] Law n° 2020-290 of March 23, 2020.

[3] Ch. Arens, « La justice face à la crise sanitaire », https://www.courdecassation.fr/toutes-les-actualites/2021/05/03/la-justice-face-la-crise-sanitaire-chantal-arens.

[4] See F. Johannès, « Coronavirus : l'état d'urgence en France bouscule l'État de droit », Le Monde, March 30, 2020, https://www.lemonde.fr/police-justice/article/2020/03/30/en-france-l-etat-d-urgence-bouscule-l-etat-de-droit_6034889_1653578.html ; D. Rousseau, « Attention à ne pas multiplier les états d'urgence », Le Point, March 20, 2020, https://www.lepoint.fr/societe/dominique-rousseau-attention-a-ne-pas-multiplier-les-etats-d-urgence-20-03-2020-2368064_23.php.

[5] M. Troper, Le droit et la nécessité, PUF, coll. « Leviathan », 2011, p. 99.

The question that arises is whether the judges had the necessary tools to carry out their missions and if they used all their powers to guarantee effective protection of the fundamental rights and freedoms? The analysis of the situation shows that, through certain actions, the function of the courts has been reduced, sometimes to a minimum service (I). In the same time, even when the courts were seized by some litigation, in order to control possible violations of rights and freedoms, in a majority of cases they practices a self-limiting approach of their control (II). The result of their activity did not respond to the citizens' or scholars' expectations concerning the guarantee of an effective protection of the fundamental rights and freedoms.

I – The measures implying a weakening of the role of courts during the Covid-19 crisis

We are going to analyze three measures that seem most significant to us. The first one was the use of Article 15 of the European Convention on Human Rights (ECHR). This article allows the Member States of the Council of Europe to derogate, in exceptional circumstances, from their obligation to ensure an effective protection of the rights and freedoms which are guaranteed by the Convention. During the period March-April 2020, ten countries informed the Secretary General of the Council of Europe of their decision to implement Article 15 of the Convention: Albania[6], Armenia[7], Estonia[8], Georgia[9], Latvia[10], North Macedonia[11], Republic of Moldova[12], Romania[13], Saint Martin[14] and Serbia[15].

[6] Derogation contained in the Note Verbale of the Permanent Representation of Albania to the Council of Europe, registered at the Secretariat General on March 31, 2020, https://rm.coe.int/16809e0fe5.

[7] Derogation contained in a Note Verbale of the Permanent Representation of the Republic of Armenia, registered at the Secretariat General on March 19, 2020, https://rm.coe.int/16809cf885.

[8] Derogation contained in a Note Verbale of the Permanent Representation of Estonia to the Council of Europe, registered at the Secretariat General on March 20, 2020, https://rm.coe.int/16809cfa87.

[9] Derogation contained in a Note Verbale of the Permanent Representation of Georgia, registered at the Secretariat General on March 23, 2020, https://rm.coe.int/16809cff20.

[10] Derogation contained in a Note Verbale of the Permanent Representation of Latvia, registered at the Secretariat General on March 16, 2020, https://rm.coe.int/16809ce9f2.

[11] Derogation contained in a Note Verbale of the Permanent Representation of North Macedonia, registered at the Secretariat General on April 1, 2020, https://rm.coe.int/16809e1288.

[12] Derogation contained in a Note Verbale of the Permanent Representation of the Republic of Moldova, registered at the Secretariat General on March 19, 2020, https://rm.coe.int/16809cf9a2.

[13] Derogation contained in a Note Verbale of the Permanent Representation of Romania to the Council of Europe, registered at the Secretariat General on March 17, 2020, https://rm.coe.int/16809cee30.

[14] Derogation contained in a Note Verbale of the Ministry of Foreign Affairs of San Marino, registered at the Secretariat General on April 10, 2020, https://rm.coe.int/16809e2770.

[15] Derogation contained in a Note Verbale of the Ministry of Foreign Affairs of the Republic of Serbia, registered at the Secretariat General on April 6, 2020, https://rm.coe.int/16809e1d98.

In a first time, many criticisms were leveled at this initiative. In the context of the debates around the need for France to take advantage of this right of derogation, the argument put forward by the opponents of such a measure was that of the young democracies, their decision having in fact been induced by their perfect knowledge of the fragile nature of the national system for the protection of rights and freedoms and therefore by the objective of taking the initiative to avoid future convictions[16]. In their opinion, the situation in France could not be compared to that of these countries. Other scholars declared[17], on the contrary, that the position of Western countries – especially that of France, Italy, the United Kingdom, Germany, founding countries of the ECHR – was surprising, because the measures introduced by national governments to fight against Covid-19 were more restrictive. The risk of violation of fundamental rights and freedoms was higher than in the ten States applying Article 15 of the ECHR.

It is important to underline that this choice does not lead to a suspension of the Member States' obligations. First of all, in Article 15 § 2 of the ECHR, any infringement of the so-called "absolute" rights is prohibited: Article 2, right to life; Article 3, prohibition of inhuman and degrading treatment; Article 4 § 1, prohibition of slavery; Article 7, the principle of legality of criminal offenses (no punishment without law). None of these articles could therefore be subject to restrictions or exceptions, including under the influence of a "state of health emergency".

Article 15 of the ECHR only authorizes, under certain conditions, greater restrictions on other guaranteed rights than in normal times. It is the case of the rights which may already be subject to restrictions in ordinary times, like freedom of expression, the right to be informed, the right to respect for private life or property. Article 15 § 1 of the ECHR allows States to "take measures derogating from the obligations provided for in the Convention, strictly insofar as the situation so requires and on the condition that these measures are not inconsistent with other obligations under international law". In other words, the derogating measures remain subject to the respect of the principle of proportionality and, of course, to judicial review. That is why all the States, those having involved Article 15 of the ECHR and those that haven't done it, had to find solutions to ensure the functioning of their system of justice, in compliance with the requirements of a fair trial arising from Article 6 of the ECHR.

In practice, the solutions that were adopted by the Member States of the Council of Europe, whether Western or Eastern countries, have not been fundamentally different. The analysis of the information they communicated to the European Commission for the Efficiency of Justice[18] shows that a major reorganization of the functioning of justice has been carried out, based mainly on the provisional establishment of new rules of procedural order, in particular by a choice to prioritize disputes and to modify deadlines.

[16] See in particular: the analysis published on April 24, 2020, on the blog "Libertescheries", http://libertescheries.blogspot.com/2020/04/covid-19-larticle-15-un-pari-pas-du.html.

[17] J.-P. Costa, « Le recours à l'article 15 de la Convention européenne des droits de l'homme », https://blog.leclubdesjuristes.com/recours-article-15-cedh/; F. Sudre, « La mise en quarantaine de la Convention européenne des droits de l'homme », https://blog.leclubdesjuristes.com/la-mise-en-quarantaine-de-la-convention-europeenne-des-droits-de-lhomme/.

[18] Management of the judiciary – compilation of comments and comments by country, https://www.coe.int/fr/web/cepej/compilation-comments.

Concerning the decision to prioritize the disputes, the goal was to reduce the number of hearings as much as possible and therefore the physical presence in situ in order to avoid contact. In Lithuania, for example, the Judicial Council recommended that the courts maintain hearings only for priority emergencies concerning cases of detention and removal of children from a dangerous environment. The other cases had to be judged on the basis of written conclusions by a single judge. The same choice was made in Azerbaijan[19], Bosnia and Herzegovina[20].

In Bulgaria, the Judicial College of the Supreme Court of Justice recommended in a note from the 10th of March 2020 to the presidents of courts to suspend hearings for a minimum period of one month. This recommendation was not followed by all courts. As a result, the practice led to a lack of uniformity in the functioning of courts throughout the country. In order to stop such a situation, the Bulgarian National Assembly adopted on the 24th of March 2020 the Law "On the state of emergency", which established the list of cases for which a public hearing was possible.

In Poland, by the Law of the 28th of March 2020, called "anti-crisis shield" were introduced, in addition to a limiting list of disputes that could be judged in public hearing, derogatory rules of jurisdiction providing for flexibility with regard to territorial jurisdiction and the possibility for the president of the courts of appeal to transfer cases from jurisdictions that have had to cease their activity to others less affected by Covid-19.

As we can see, in order to limit the number of public hearings, the method generally used was that of establishing a list of priority disputes. In Slovenia, it was the President of the Supreme Court who, as head of judicial administration, has drawn up a list of urgent cases to be dealt with in public hearings. These were, in particular, cases concerning child custody, psychiatric internment, trials relating to fake news. In Romania, by Decision n° 257 of the 17th of March 2020, the Superior Council of the Judiciary first entrusted the courts of appeal with the definition of priority disputes in civil matters. However, this initial position was rapidly reconsidered. By Decision n° 417 of the 24th of March 2020, were listed the disputes to be considered as priorities: guardianships/curatorship; compulsory hospitalization; measures for the protection of minors; suspensions of the execution of administrative acts; provisional suspensions of the execution of judgments; execution permissions; precautionary measures; etc.

In the criminal field, the minimum hearing service was devoted essentially to persons arrested or detained (Austria, Greece, Portugal) and to proceedings aimed at non-compliance with the measures decided by the public authorities to prevent the spread of Covid-19 (Bosnia and Herzegovina, Serbia). Given the danger to which victims were exposed during the lockdown, domestic violence was also included in the list of priority criminal cases in the majority of countries. Finally, more exceptionally (Serbia, Slovenia), press cases related to information about the epidemic have been expressly provided for as having to be dealt with as a priority.

These two types of measures, based on the method of prioritization and the urgency of the litigation, certainly made it possible to lighten the work of the courts, but at the same time raised the question of compliance with legal deadlines, which had to be resolved in order not to deprive litigants of the effectiveness of the fundamental right of access to justice. This is why measures have also been taken to adjust legal deadlines.

[19] Supreme Court of the Republic of Azerbaijan, Opinion on measures to be taken by courts to prevent the spread of the Covid-19 virus, March 19, 2020.

[20] High Council of Prosecutors and Judges, Opinion on the organization of the work of courts and prosecutors' offices, March 22, 2020.

The analysis of the information communicated by the Member States to the European Commission for the Efficiency of Justice shows that most of them have taken specific legal measures to remedy the problem of procedural delays following the declaration of the state of emergency. However, the practices were quite different. In Serbia, for example, by a government Decree adopted the 20th of March 2020, the deadlines in most legal proceedings have been suspended until further notice from the 15th of March 2020, with therefore a retroactive application, in all types of litigations – constitutional, civil, administrative, commercial and criminal actions – excepting the litigations that have been defined as being priority.

The solution chosen by Serbia was very close to that established in France, particularly with regard to the general nature of the application of the derogation and, more particularly, the impossibility for citizens to seize the Constitutional Council (Conseil constitutionnel)[21]. However, France did not choose the suspension but the extension of the deadlines, as it was also the case of the two European courts[22]. According to Article 2 of Ordinance n° 2020-306 of the 25th of March 2020 relating to the extension of time delays expired during the health emergency period and the adaptation of procedures during this same period: "Any act, legal action, registration, declaration, notification or publication prescribed by law or regulation on pain of nullity, sanction, lapse, foreclosure, prescription, unenforceability, inadmissibility, expiry, automatic withdrawal, application of a special scheme, void or forfeiture of any right whatsoever and which should have been performed during the period mentioned in Article 1 will be deemed to have been performed on time if it was performed within a period which may not exceed, from the end of this period, the time legally allowed to act, within the limit of two months". The same rule was applied to any payment prescribed by law or regulation for the acquisition or preservation of a right. In practice, this derogation was applied in France from the 12th of March 2020 to the 24th of June 2020.

Bulgaria chose the suspension of procedural deadlines, but it was not almost total as in the Serbian example. In an appendix attached to the Law "On the state of emergency" of the 24th of March 2020, the Bulgarian legislator listed all the cases to which the suspension was not applicable in each type of litigation, i.e. criminal, administrative, civil and commercial. Finally, the very exhaustive nature of the established list has greatly reduced the number of disputes for which the suspension of deadlines regime had to be applied.

In other States, such a measure has not been provided for. In Lithuania, for example, the Judicial Council simply recommended that judges assess the impact on the progress of the proceedings of the measures which were taken in the context of the state of health emergency in order to appreciate the consequences in terms of time limit. It was therefore a matter of granting sovereign discretion in each case. In Hungary, judges could only admit one exception to the expiry of a time limit, namely that the procedural document could not be issued in writing or electronic transmission.

[21] A. Levande, « QPC en suspens sanitaire », https://blog.leclubdesjuristes.com/qpc-en-suspens-sanitaire/.

[22] The European Court of Human Rights applied the health measures adopted by the French authorities and generalized teleworking. It established procedures for urgent requests for interim measures in cases of imminent risk of irreparable harm (Article 39 of the Rules of Court) and extended the procedural deadlines in order to take into account the difficulties of the parties in lodging requests. The choice made by the Court of Justice of the European Union was different. In line with the measures taken by the Grand Duchy of Luxembourg, the Court postponed the hearings and generalized the teleworking to ensure the continuity of the European public service of justice. Only the deadlines set in current procedures have been extended by one month. On the other hand, the appeal deadlines continued to run.

In order to guarantee a better functioning of justice during the lockdown, the question of the use of new technologies was also raised. It was notably noted that the most advanced justice systems in the organization of the dematerialized way of management of the activity were the best prepared to face the difficulties due to the Covid-19 crisis. This was the case of Norway, for example, which was a pioneer in terms of quality policy, of practice of all-digital, dematerialized administrative and budgetary management, videoconference hearings, etc. The Baltic countries, where the practice of videoconference hearings have been introduced before the start of the Covid-19 crisis, have also encountered no difficulties in this regard.

A similar situation was observed in Moldova where, from 2019, criminal cases relating to early release as well as complaints about detention conditions were heard by videoconference. The judicial and prison establishments were therefore already equipped with the technical equipment offering the possibility of on-line connection. The practice has simply been extended to other litigation. From the 18th of March 2020 (immediately after the declaration of the state of emergency) until the end of April 2020, courts in Moldova used the videoconferencing system to conduct more than 600 hearings.

These examples show that the adoption of reforms prior to the health crisis, by following the projects for change towards cyberjustice promoted since 2016 by the European institutions[23], has enabled a faster adaptation of the activity of the courts, despite the absence of real experience. These practices were above all provided for by the legal framework, situation which reduced the risk of contesting the irregular nature of the procedures.

Some countries had, on the contrary, a significant delay with regard to the concrete use of digital technology by the courts, in particular: Belgium, France, Croatia, Cyprus, Bulgaria, Romania, Montenegro, Greece[24]. In France, the acceleration of reforms in this direction began from 2021. The ministerial Decree of the 5th of May 2021 relating to the entry into force of new methods of electronic communication in criminal litigation[25] provided for the start of digital criminal procedure in all criminal courts from the 12th of May 2021. This reform has in fact pursued the objective of accelerating practices and catching up with the delay highlighted by the European Commission.

All the elements analyzed above show that the Covid-19 crisis has truly impacted the work of judges, notwithstanding the adaptation measures which were taken. However, as we'll see later, the judges adopted themselves unambitious positions, surely to allow the political authorities to act in a context of unprecedented crisis, but which had a harmful impact on the level of protection of rights and freedoms.

[23] See in this sense: European Commission for the Efficiency of Justice, Toolkit for supporting the implementation of the Guidelines on how to drive change towards Cyberjustice, June 14, 2019, CEPEJ(2019)7, https:// rm.coe.int/cepej-boite-a-tools-cyberjustice-fr-cepej-2019-7/168094ef3d.

[24] Idem, p. 49.

[25] Published in JO n° 0107 of May 7, 2021, https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000043482622.

II – A role self-limited by the courts themselves

For a more precise analysis, we will take a single case of study: that of France. Given the fact that during the period of lockdown the French Constitutional Council could not be seized within the framework of the ex-post review, the main defender of rights and freedoms was the administrative judge. In France, in accordance with Article L. 521-2 of the Code of Administrative Justice, the administrative judge can be seized within the framework of an urgent procedure, called the référé-liberté, in case of serious and manifestly illegal attacks on fundamental freedoms. The judge pronounces a decision within 48 hours. Another emergency procedure is the référé-suspension, which is provided for in article L. 521-1 of the Code of Administrative Justice. In this procedure, the administrative judge must rule within approximately three weeks, by suspending the application of an administrative decision until its legality is verified. These were the two procedures most often used during the pandemic.

Between the 19th of March 2020 and the 19th of March 2022, 577 decisions have been pronounced by the Conseil d'État (the Highest Administrative Court in France) relating to "Covid litigation". The requests were extremely diverse. According to the information communicated by the Conseil d'État, they came from individuals, companies, associations, political parties. Some were aimed at increasing the severity of the lockdown, others at its cancelling. Some raised purely legal questions of legality, others extremely concrete problems relating, in particular, to the organization and operation of public services.

Most of the major fundamental rights and freedoms were invoked, from the right to life to the freedom to move, including the right to health, freedom of worship, freedom of assembly, freedom of enterprise, the right to strike[26]. The analysis of the decisions pronounced by the Conseil d'État allows to identify a double evolution in the office of the judge in this kind of litigation. On the one hand, can be noted a strengthening of the power of injunction of the administrative judge (A) and on the other, the control carried out left a limited place to the effective protection of the fundamental rights and freedoms (B).

[26] B. Lasserre, « Le Conseil d'État face à la crise sanitaire du Covid-19 », December 18, 2020, https://www.conseil-etat.fr/publications-colloques/discours-et-interventions/de-nouvelles-frontieres-pour-le-juge-administratif-par-bruno-lasserre-vice-president-du-conseil-d-etat.

A– Strengthening the power of injunction

In case of urgent procedures, and specifically in the procedure of référé-liberté, the Conseil d'État exercises a certain restraint in the implementation of its power of injunction. From 2000, year of the beginning of implementation of such type of procedure, till March 2020, it pronounced 134 injunctions. Their analysis highlights three main categories of injunctions. The first one is made up of negative obligations: injunctions by which the judge imposes on the administration the duty to refrain from acting in order not to infringe a fundamental right or freedom. They constitute approximately 7% of the total number of injunctions. The second one is made up of those tending to the examination, re-examination or instruction of the applicants' request or situation. Their number is about of 31%. Finally, we have those constituting positive obligations. In this case, the administration must act in order to effectively guarantee a fundamental right or freedom. They constitute 59% of the total number of injunctions pronounced from 2000 to 2020. In all the cases when the Conseil d'État pronounced an injunction, he always established the existence of a serious and manifestly illegal interference with a fundamental right or freedom[27].

In the case of the seventeen decisions pronounced during the first three months of Covid-19 crisis, they resulted from a contra legem use of the powers that the administrative judge derives from article L. 521-2 of the Code of Administrative Justice. On the 22nd of March 2020, the Conseil d'État issued injunctions while ruling that there was, in this case, no serious and manifestly illegal attack on a fundamental right or freedom likely to be observed[28]. Article L. 521-2 of the Code of Administrative Justice provides, however, that it is in the event that the administration "would have caused, […] a serious and manifestly illegal attack" on a fundamental right or freedom that the judge can pronounce injunctions. Regarding the goal of the injunctions, the national nature of the consequences of the health crisis had a significant impact on the administrative authority to which the injunctions were addressed. Eleven of the seventeen injunctions issued were, exclusively or partially, against a Minister or the Prime Minister[29].

As for the effects generated by the injunctions issued, they were very important. For example, the Conseil d'État ordered the Minister of the Interior "to take the necessary measures so that the "hygiene kits" are available and systematically offered to persons in custody"[30] or even ordered "the State to cease, without delay, to carry out surveillance measures by drone in Paris"[31]. These injunctions have no common measure, by their consequences and their extent, with those pronounced before the health crisis.

[27] M. Bartolucci, « Le pouvoir d'injonction du juge administratif revisité par les circonstances exceptionnelles de la crise sanitaire du Covid-19 », LPA, 2020, n° 154b5, p. 9.

[28] Conseil d'État (CE), April 30, 2020, req. n° 440179 ; CE, April 30, 2020, req. n° 440250 ; CE, May 7, 2020, req. n° 440151 ; CE, May 18, 2020, req. n° 440366 ; CE, June 26, 2020, req. n° 441065 ; CE, May 18, 2020, req. n° 440442 ; CE, July 8, 2020, req. n °440756 ; CE, July 10, 2020, req. n° 441518 ; CE, September 6, 2020, req. n° 443750 ; CE, September 6, 2020, req. n° 443751 ; CE, November 29, 2020, req. n° 446930 ; CE, March 2, 2021, req. n° 449514 ; CE, March 17, 2021, req. n° 450122 ; CE, June 17, 2021, req. n° 453113 ; CE, July 9, 2021, req. n° 454174 ; CE, November 22, 2021, req. n° 456924.

[29] CE, April 30, 2020, req. n° 440179 ; CE, April 30, 2020, req. n° 440250 ; CE, May 7, 2020, req. n° 440151, CE, May 18, 2020, req. n° 440366, CE, July 10, 2020, req. n° 441518, CE, November 29, 2020, req. n° 446930 ; CE, March 17, 2021, req. n° 450122 ; CE, June 17, 2021, req. n° 453113 ; CE, July 9, 2021, req. n° 454174 ; CE, November 22, 2021, req. n° 456924.

[30] CE, November 22, 2021, req. n° 456924.

[31] CE, May 18, 2020, req. n° 440442.

Finally, the singularity of the pronounced injunctions resulted from the fact that some of them were normative. As an example, we can take the Decision of the 22nd of March 2020, where the Conseil d'État pronounced three injunctions of this type with regard to the Prime Minister and the Minister of Health. The administrative judges instructed them to "assess the public health risks of keeping markets open, given their size and level of footfall". As a result, the Decree of the 23rd of March 2020 prescribing the general measures necessary to deal with the Covid-19 pandemic in the context of the state of health emergency provides that, in principle "the holding of markets, covered or no and whatever the purpose, is prohibited"[32], while Decree n° 2020-260 of the 16th of March 2020 regulating travel in the context of the fight against the spread of the Covid-19 virus did not pose such prohibition. Similarly, on the 18th of May 2020, the Conseil d'État ordered the Prime Minister to modify the Decree of the 11th of May 2020 "by taking measures strictly proportionate to the health risks incurred and appropriate to the circumstances of time and place applicable at this start of deconfinement"[33].
The reinforced use of this judge's power of injunction during the Covid-19 crisis should have led to an increase in the protection of fundamental rights and freedoms. However, that was not the case de facto because of a less severe assessment of proportionality.

B – An unsatisfactory control of the infringement of fundamental rights and freedoms

The control of the infringements of fundamental rights and freedoms by the judge within the framework of the procedure of référé-liberté was unsatisfactory because the control of proportionality was implemented inconsistently. As some French scholars pointed out, in times of crisis, the judges "sometimes evolve their control in the direction of increased protection of fundamental freedoms, sometimes resorts to certain parameters which often lead to its neutralization"[34]. The inconsistent implementation of the proportionality control highlighted this ambivalence in the action of the administrative judge during the Covid-19 crisis. It appeared and disappeared according to the different waves of the pandemic.
In a high number of cases of référé-liberté, the Conseil d'État has not implemented the control of proportionality, even though its official communication indicates that it "has verified that these violations of freedoms were necessary, appropriate and proportionate"[35]. During the Covid-19 crisis, the administrative judges integrated the "simplicity","clarity" and "coherence" of police measures in the control of their proportionality.

[32] Decree n° 2020-293 of March 23, 2020, prescribing the general measures necessary to deal with the Covid-19 pandemic within the framework of the state of health emergency.

[33] Decree n° 2020-548 of May 11, 2020, prescribing the general measures necessary to deal with the Covid-19 pandemic within the framework of the state of health emergency.

[34] C. Roulhac, « Les ambivalences du référé-liberté en temps de crise », in X. Dupré de Boulois, X. Phillipe (ed.), Gouverner et juger en période de crise, Mare & martin, 2023, p. 251-264.

[35] Press release of the Conseil d'État, « Un an de recours en justice liés à la Covid-19 – Retour en chiffres sur l'activité du CE, juge de l'urgence et des libertés », https://www.conseil-etat.fr/actualites/covid-19-retour-en-chiffres-sur-un-an-de-recours-devant-le-conseil-d-etat-juge-de-l-urgence-et-des-libertes.

For example, on the 6th of September 2020, the Conseil d'État annulled the Decision of the Administrative Court of Appeal of Lyon which had ordered the Préfet of the Rhône "to exclude from the obligation to wear a mask the places […] which [were] not characterized by a high population density or by local circumstances likely to favor the spread of the SARS-CoV-2 virus and the time periods during which no particular risk of spread of this virus exists" on the grounds that "the proportionate nature of a police measure must necessarily be assessed taking into account […] its simplicity and clarity". According to the point of view of the Conseil d'État, the administration, when determining the places in which it makes it compulsory to wear a mask, "has the right to identify areas large enough to coherently establish the points of the territory characterized by a high density of people or a difficulty in ensuring respect for physical distance […]. It can, likewise, define the hours of application of this rule in the same way throughout the same municipality, or even the same department".

The question of rejection of the requests is also very interesting to be analyzed. From the 19th of March 2020 and the 31st of May 2020, the Conseil d'État was seized of about three hundred référés-libertés. In less than three months, the Supreme Administrative Court has been seized of three times more requests of this type than it does on average in one year. The measures requested by the applicants were particularly varied:

-to pronounce "total lockdown of the population"[36];

-to ensure to the applicants the benefit of temporary emergency reception in an approved child protection structure[37];

-to proceed with the temporary closure of administrative detention centers[38] or to adopt all the decisions and urgent measures necessary to ensure a sufficient equipment to protect the health of the applicants[39].

Despite this massive and diversified use of the possibility of forming a référé-liberté, only six requests resulted in the pronunciation of injunctions. The reason for rejection based on the material tools available to the administration has been mobilized on a massive scale. In other words, the administration's lack of material justified, by a kind of application of the theory of impossible formalities, the latter's failing action – as if the insufficient availability of material tools was foreign to the Government's action[40]. By taking into account the material tools available to the administration, the Conseil d'État changed the manner its control was done. It didn't conclude to the existence of a serious and manifestly illegal violation of a fundamental freedom but to the failure to implement the material tools available to the administration.

[36] CE, March 22, 2020, req. n° 439674.

[37] CE, May 4, 2021, req. n° 451737.

[38] CE, March 27, 2020, req. n° 439720.

[39] CE, March 28, 2020, req. n° 439693.

[40] O. Le Bot, « Référé-liberté à la maison d'arrêt de Fresnes : les limites de l'article L. 521-2 », AJDA, 2017, p. 2540.

In the same way, the promises and efforts of the administration have become a kind of limits to conclude that a fundamental freedom has been violated. For example, on the 2nd of April 2020, the Conseil d'État refused to issue injunctions on the ground that "the administration argues that it is continuing its efforts to increase them further in the short term [...] without excluding resort to requisitions if necessary. It is therefore the high probability of seeing the situation improve that justifies the rejection of a substantial part of the requests made" [41].

The case of French courts was not an exception. Different studies and reports show that the situation was almost the same in the other European countries and for the other types of crises. In a very interesting study published by Professor Burt Neuborne on the role of courts in time of war[42], is analyzed the action of the Supreme Court of the United States during all the situations of war that the country has known. In the author's opinion, the lesson drawn from the wartime judicial experience is that war alters the legal landscape. In each of the wartime settings, the judiciary has deferred to at least one major controversial government program deemed necessary to preserve national interests. In the aftermath of the Civil War, the American Supreme Court ducked legal issues raised by military reconstruction. During the World War I, the High Court supported censorship that, ultimately, proved unendurable by a free society. During the World War II, the American Court accepted the Japanese internment. During the Cold War, the Court upheld the ban on the Communist Party. During the Vietnam War, the Court deferred to arguments that jailing draft card burners was necessary to protect the Selective Service System. In a more recent study, Professor William C. Banks reaches a similar conclusion[43].

Unfortunately, the same observation can be made in the fight against terrorism. The courts give the executive branch whatever power it says it needs to engage in surveillance, wiretapping, infiltration, coercive interrogation, and other investigative techniques. The situation in our days is more and more dangerous for the fundamental rights and freedoms because we are not facing to a specific crisis, like security or health crisis. We live now in an era of polycrises, which is characterized by multiple simultaneous crises, each intensifying the impacts of the others. The most important difficulty and challenge for the courts is to find a balance between the guarantee of democracy, the respect of the principle of separation of powers and the effective protection of the fundamental rights and freedoms. But their role is essential because as Professor William C. Banks says, "no other part of the government is as equipped as the judiciary to anchor the nation to its core values during a storm"[44].

[41] CE, April 2, 2020, req. n° 439763.

[42] B. Neuborne, "The Role of Courts in Time of War", N.Y.U. Rev L. & Soc. Change, vol. 29, 2005; See also the conference of the Professor B. Neuborne on the same topic: https://www.youtube.com/watch?v=rblqqamMFjU.

[43] W. C. Banks, "The Role of the Courts in Time of War", Washington & Lee Law Review Online, vol. 71, 12-2014, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2558161.

[44] Idem, p. 169.

JUDICIAL PROTECTION IN TIMES OF SANITARY CRISIS:THE JURISPRUDENCE ARISING FROM THE COVID-19 PANDEMIC

BY IOANNIS S. ANGELOU

Administrative Law Judge at the Administrative Court of First Instance of Athens - Postdoctoral Fellow, National and Kapodistrian University of Athens Law School

Dear Colleagues, Students, and Friends,

It is a great honor for me to deliver my presentation on the premises of an institute which promotes modern and free thinking; respectively, allow me to thank our gracious host, Professor Slautsky, for the kind invitation to this year's Civis Summer School, and to congratulate him on the impeccable organization of the conference. Furthermore, I would very much like to thank Ekaterini Iliadou, Assistant Professor at the Law School of the University of Athens, for giving me the opportunity to participate in this Summer School.

Besides, it is with great pleasure that I'm addressing such a vivid academic audience. In my view, our younger audience's response to this presentation will be of greater importance than the presentation itself; and this is because, during the pandemic, courts dealt with matters at the heart of liberal democracy, in a way unprecedented in recent decades.

Indeed, the Covid-19 pandemic was a major test for public and private healthcare systems, as well as for social cohesion. Apart from that, the pandemic forced (or allowed, accordingly) national courts to adjudicate upon 'hard cases'. These cases stakes were high, as they involved balancing between severe limitations on constitutional rights, and the protection of public health - in terms of the lives of individuals, and on a population basis. Thus, the courts' role as 'guardians of the constitution' was emphatically highlighted.

Methodologically, the following analysis approaches the most-similar systems design; this is because, even though the selected case-law consists of decisions and orders from both the common law, and continental legal systems (the German, the French, and apparently the Greek), all of the latter fall under the category 'western liberal democracies'. This practical research will hopefully help us examine whether the pandemic has functioned as a catalyzer for an in-depth judicial review, or if it has distracted the democratic equilibrium against constitutional rights.

Let us begin with the case-law relating to

Vaccinations and circulation of medicinal products

The matter was directly related to the containment of the pandemic; in this context, the courts seemed to have trusted the public administration's technical expertise, and deferred in front its discretion. In this context, the French Council of State (the 'Conseil d'Etat') refused, back in 2020, to issue an interim injunction to restrain the distribution of an antiviral drug to treat COVID. The Court declared the circulation of the medicine as constitutional, on the grounds that it had been approved by the National Medicines Authority, it was available by prescription, while its intake by the patients was voluntary. These factors were proved to be enough to counterbalance the lack of sufficient scientific evidence for the effectiveness of the medicine[1].

The Greek Council of State was called to judge upon whether the compulsory anti-Covid vaccination for Fire Brigade officers, and for health workers, was following the principles of proportionality and of equality provided for by the Greek Constitution. During the most critical time of the pandemic (in 2021), the Court dismissed the injunctive reliefs brought before it against the relevant measures[2]. On the merits, as for Fire Brigades, the Court ruled that the issuance of the challenged decision was mandated by compelling grounds of public interest; namely, the need to secure the continuous functioning of the Fire Brigade public service.

This continuous functioning requires the staff's complete availability; this would be seriously impaired if a considerable number of the officers would be contaminated and fall ill with COVID. Secondly, the Court ruled that vaccination was not in fact compulsory, since the officers maintain the choice not to be vaccinated; indeed, the decision of the Chief of the Fire Brigade stated that only vaccinated officers will mandatorily serve. The officers who have not, or will not, schedule their vaccination, were given a time frame to do so. In the opposite event, a replacement procedure by vaccinated officers would be initiated. Moreover, the Council of State ruled that the contested measure did not infringe manifestly the principle of proportionality, given the special working conditions of the Fire Brigade, which are characterized by extreme difficulty, team effort, physical contact, and increased mobility of the rescue units, which require the highest possible protection of the health of the officers. Finally, the Court ruled that the contested measure did not infringe the equality principle among the members of staff, due to the lack of identity of conditions between vaccinated and non-vaccinated people, considering the adverse consequences that non-vaccination may have, on the proper function of the Fire Brigade.

[1] National Medicines Authority, Decision No 439765 of the 28th of March 2020.

[2] Greek Council of State, Interim measures Committee, rulings No 250-252, 133/2021.

The Court had also validated the legality of the respective compulsory anti-Covid vaccination for health workers, based on a corresponding rationale; however, in November 2022 the Council of State paved the way for unvaccinated health workers to return to their posts; the Court ruled that the extension of their mandatory inoculation was unconstitutional, on the grounds that the authorities should have re-evaluated the necessity of the measure. To reach to this conclusion, the Court considered previous decisions of the plenary session, which had held that measures taken to protect public health against Covid must be periodically reviewed by the competent state bodies depending on the existing scientific data.

Conversely to vaccination objectors, there were applicants who requested their inclusion in the vaccination list by priority, by virtue of their status as attorneys at law, which implies their continuous presence in court rooms; the request was dismissed as groundless[3].

As for freedoms of movement, and of assembly

In Greece, one of the most highly debated topics during the pandemic was about the restrictions imposed on the freedom of movement, and of assembly. Amongst the most controversial government's decisions, was the ban of two annual protest marches - the one in commemoration of the Athens Polytechnic Uprising in the 70s, and the other as a tribute paid to 15-year-old who was shot-dead by a policeman in 2008. At the same time, any gathering of four or more individuals nationwide for the four day-period anniversary was banned. The Interim Measures Committee of the Greek Council of State was called to judge upon a demand for suspension of that general ban. The Court considered that the inflation of the public health interest justifies the restrictions. Secondly, exercising a smooth necessity test, the Committee ruled that the conditions of the pandemic justify the State's large discretionary power; additionally, the measure was temporary and exceptional. Considering these, the Committee rejected the applicant's claims[4].

[3] Greek Council of State, judgment No 1013/2021.

[4] See Greek Council of State, Interim Measures Committee, rulings No 262, 263/2020, cf. ruling No 84/2021.

Equivalent issues have been brought before other supreme courts as well.

During the early period of the pandemic, the German Federal Constitutional Court was dismissing all the applications for a preliminary injunction, which were challenging the administrative measures imposed to contain the pandemic. The Court ruled that the measures certainly amounted to a considerable restriction of fundamental freedoms; however, it was decided that the consequences of the measures were serious but not unreasonable. In this context, the Court was ruling, as we can see in its order of 7th April 2020[5], that the risks posed to life and health outweigh the restrictions of personal freedom, given that: (a) the provisions only apply temporarily, (b) that they provide for many exceptions to the restrictions, and (c) that individual interests must be accounted for when exercising discretion as to the punishment of violations.On the contrary, by way of two interim orders in April 2020[6], the Court lifted the ban on public demonstrations imposed by municipalities, on the grounds that the bans in question have been enacted without examining the possibility of authorizing the gatherings, considering the precautions taken to minimize the risk of infection, and the specific scientific data available. Thus, the Court ruled that the measures resulted de facto in a general ban on all demonstrations; therefore, they ran the risk of violating the relevant Basic Law's provisions.

Between March and May 2020, when restrictions on freedoms were at their greatest, Conseil d' Etat[7] was mainly asked to examine applications for the tightening, or relaxation, of these restrictions.

At that time, the Court clearly prioritized the suspension of the pandemic, over the protection of other constitutional rights. This became apparent from the very first hearing in relation to Covid before the interim relief judge[8], on March 2020; the Court asked the French Prime Minister, and the Minister for Health, to safeguard efficiently the imposed curfew, mainly during the outdoor markets' opening hours[9]. As of May 2020, the improved public health situation brought new issues before the Court. The interim relief judge has therefore regularly issued rulings on the necessity and proportionality of certain restrictions on religious worship, and on demonstrations in general. Mainly, we refer to the interim relief judge's decision of 6th July 2020[10], on the legality of a presidential decree[11] prohibiting any demonstration not previously authorised by the Prefect, who was competent to verify whether the measures can be respected. However, the decree did not provide for a time limit for the Prefect to decide. Whilst, in the absence of such a decision, the event remained banned without the organisers being able to refer the matter to the judge in good time. The interim relief judge considered that there was serious doubt as to whether this procedure was constitutional. So, the relevant provisions were suspended. Finally, with the second lockdown in late October 2020, the general rules of the first lockdown were replaced by more nuanced restrictions, such as the closure of certain businesses rather than others, or curfews differentiated according to regions. The Conseil d' État ruled on the consistency of the measures imposed, on a case-by-case basis, under the light of the respective scientific data.

[5] 1 BvR 755/20

[6] Bundesverfassungsgericht, order of 15.4.2020, 1 BvR 828/20, order of 1.4.2020, 1 BvQ 37/20.

[7] The French Council of State.

[8] 'Juge des référés'.

[9] Conseil d' État, Interim Measures Committee rulings No 439.674.

[10] Conseil d'État, juge des référés, order of 6/07/2020, Nos 441257, 441263, and 441384.

[11] By virtue of a Presidential Decree issued on May 31st, 2020.

In the field of religious freedom

In Greece, religious gatherings had been heavily restricted since the first week of November 2020[12], in addition to the relevant limitations that had been imposed during the first lockdown at the beginning of the year. Churches remained closed to worshipers during the second lockdown (except for Christmas Eve and New Year's holiday), and no outdoor public ceremonies were permitted. After January 11, worshipers were allowed to attend church for Sunday services, under strict health conditions, and social distancing. Apart from funerals, the exercise of religious beliefs was possible to the public only individually, and in private. The immediate reaction of the Greek Church escalated quickly to a massive civil disobedience at the celebration of Epiphany on 6 January 2021, when Greek Orthodox Churches were opened to worshippers, contrary to the ministerial decision. The Courts temporarily neutralized the restricted constitutional rights; according to the Greek Council of State[13], these extreme limitations, or even suspension, of religious freedom, was an eligible option within the proportionality and the necessity test, justified by the inflation of the public health interest. Secondly, the temporary and exceptional character of the contested measures was deemed crucial for the rejection of the applicant's claims. However, the Court referred explicitly to the obligation of the public administration to adequately justify each measure, considering the relevant scientific evidence, as well as the total duration of period for which the collective aspect of freedom to manifest religion has been restricted.

The Greek Council of State's assessment was not the same in the meantime between the first and the second lockdown; at that point (namely, June 2020), the Court was called upon to judge the legality of a ministerial decision which allowed religious gatherings, under strict health conditions, social distancing, and for a certain period[14]. The Court upheld the decision, considering that the measure in question was proportionally milder compared to the previous ones, in line with the latest scientific evidence. Accordingly, during the crucial first two years of the pandemic, the competent Chief Judges at the Greek administrative courts of first instance were turning down remedies, against those who violated individual punitive, or precautionary measures[15].

[12] From March 16 to April 27, 2020 (for than period, see Greek Council of State, Interim Measures Committee, rulings No 49, 60/2020), and from December 13, 2020, to January 7, 2021 (see Greek Council of State, Interim Measures Committee, rulings No 1, 2/2021), consecutively. Also, cf. Greek Council of State, Interim Measures Committee, ruling No 3/2021.

[13] Greek Council of State, Interim Measures Committee, rulings No 99/2020, 60/2020, 49/2020.

[14] Greek Council of State, Interim Measures Committee, rulings No 161/2020.

[15] Inter alia, see the AP342/2020 Order of the Competent President of the Administrative Court of First Instance of Athens.

In France, by virtue of several decrees[16], all gatherings, for a non-professional reason, that bring together more than 10 -or 30, accordingly- people, simultaneously in a public place, were banned – including any gathering in places of worship, except funerals. The constitutionality of the decree was challenged before the Conseil d' Etat, by means of a special interim injunction provided for in the French rules of administrative procedure, namely the 'Référé-liberté'. For this remedy to be admissible, the applicant must validly invoke an urgent, serious, and manifestly illegal infringement of a fundamental freedom. The Conseil d' Etat ruled[17] that such bans of "general and absolute" nature are disproportionate, and constitute a "serious and manifestly illegal infringement" of the freedom of worship in its collective aspect[18]. The ban was considered as disproportionate, inasmuch similar restrictions had not been imposed on other forms of public gatherings, such as outdoor markets.

Additionally, the Court ruled that the administration failed to consider, before imposing the restrictions, both the precautions that were planned to minimize the risk of infection, and the scientific data available. Much more, the Court reiterated that the freedom of worship is listed among fundamental freedoms; this broadens, according to the Court's reasoning, the scope of the freedom of worship (compared to other forms of gatherings), as well as the scope of its judicial protection. On these grounds, the Court enjoined the Government to modify the relevant decrees, as it indeed happened.

Just eleven days after issuing the latest of these orders, the Conseil d' Etat was called upon to judge a request for interim injunction submitted by university officials; in this case, the contested measure was the suspension of on-campus classes, as a means of containing the spread of the pandemic. The Court dismissed the request, considering that distance-learning courses are partially sufficient to fill the gap, under the applicable extraordinary circumstances[19].

As expected, the Court was criticized for being influenced by circumstances, when determining whether the freedom of worships' limitations are proportionate to public health's protection. This might seem reasonable, especially in the light of the prevalent, in the French state, principle of secularity (known as 'laïcité'). Everyone can make their own conclusions, but things appear to be more complex; mainly, it should be noted that French law reflects a distinction between the freedom of religious conscience, and the freedom to worship; it took more than a century for the freedom to worship to be recognized as a fundamental freedom, so the Court appears to be, over the last decades, more sensitive when it comes to the protection of this right.

[16] Decrees no. 2020-548 of 11 May 2020, and decrees no. 2020-1310 of 29 October 2020.

[17] Consecutively on 18th of May[1], on 7th, and 29th of November 2020· Conseil d'État, order, 29 November 2020, Association Civitas, Conférence de sévêques de France et autres, MgrM., Association pour la messe, nos. 446,930, 446,941, 446,968, and 446.

[18] Applying Article 10 of the Declaration of the Rights of Man and of the Citizen, and by virtue of provisions deriving from special local legislation of the Alsace-Monselle regions (in lieu of the 1905 law on the separation of Church and State), as well as of the French Public Health Code.

[19] Conseil d'État, ord., 10 déc. 2020, n° 447015, M. Cassia et autres.

Now let us turn our attention to the other side of the Atlantic. The United States Supreme Court's relevant case-law is also differentiated, […] depending on the phase of the pandemic, and the intensity of the contested measure. We will refer to three orders issued by the Court, concerning the First Amendment Religious Free Exercise Rights. All three were issued on requests for injunctive measures.

At South Bay United Pentecostal Church v. the Governor of California[20], by an order issued on May 2020, the Court declined, by five votes to four, to block a California executive order placing temporary numerical restrictions on public gatherings, including places of worship[21]. The Court ruled that the measure did not infringe the relevant First Amendment Rights, considering that (a) there was no vaccine against the pandemic, (b) the provisions would only apply temporarily, and (c) all indoor areas were treated without discrimination. On these grounds, the Court considered that the inflation of the public health interest justifies the restrictions, and trusted the public administration's technical expertise.

[20] US Supreme Court, South Bay United Pentecostal Church, Et Al. V. Gavin Newsom, Governor of California, Et Al. on Application for Injunctive Relief [May 29, 2020].

[21] In particular, 25% capacity (up to 100 people).

[22] US Supreme Court, Roman Catholic Diocese of Brooklyn, New York V. Andrew M. Cuomo, Governor of New York, and Agudath Israel of America, et al. v. Cuomo, No 20A90, on Application for Injunctive Relief, No. 20A87, 592 US (2020) [November 25,2020].

Trying to curb rising infections, the New York Governor issued an executive order, to identify clusters of COVID cases, and restrict the surrounding area. The area directly around a cluster was classified as a "red" zone, where attendance at worship services was limited to 10 people. The area around a red zone was an "orange" zone, where attendance was limited to 25 people. And the area around an orange zone was a "yellow" zone, where attendance of worshipers was limited to 50% of the building's capacity. In contrast, certain secular businesses deemed "essential" were permitted to remain open. The Roman Catholic Diocese of Brooklyn, and two Orthodox Jewish synagogues, sued to block enforcement of the measures; they claimed that the executive order violated their right to the free exercise of religion. At first, the Court deemed the request admissible, considering that the change of an area's classification from "red" to "yellow" has no effect on the applicants' legitimate interest. On the merits, the Court ruled[22], again with a majority of one vote, that the applicants are entitled to a preliminary injunction, mainly because they have shown a likelihood of success, on their First Amendment claims. It was held that applicants had made a "strong" showing that the restrictions violated a "minimum requirement of neutrality"; this happened by specifically naming religious entities for restrictions (namely, a church and a synagogue, which were "single[d] out […] for especially harsh treatment"), while allowing secular businesses, which were categorized as "essential."

Furthermore, the Court ruled that the Administration had wrongfully omitted to consider the adoption of less restrictive rules. Second, the Court noted that "the loss of First Amendment freedoms, for even minimal periods of time, […] constitutes irreparable injury." Finally, the Court found that the government had not demonstrated that the requested relief would harm the public, as it did not claim that attendance at the applicants' services resulted in the spread of the disease.

Finally[23], by co-judged orders issued in May 2021, the Court ruled that California was prohibited from enforcing the prohibition on indoor worship services. However, the State could enforce capacity limitations, and could also continue to prohibit "singing and chanting" during services. Approaching the end of the pandemic, the Court started to examine the rationale of each measure in separate, balancing the Administration's broad discretion against the right to judicial protection.

In Germany, the Federal Constitutional Court rejected an application to temporarily suspend, during the Easter days of 2020, the application of a provision of the Hessian state regulation against COVID; this provision was prohibiting religious denominations from holding meetings to worship together. While confirming this prohibition in the specific circumstances of the case, the Court considered the importance of the fundamental right of freedom of belief and, in particular, the guarantee of the free exercise of religion; in this context, the Court stressed, that the need for such a prohibition, must be strictly assessed in each case, in the light of the principle of proportionality, and considering the development of the pandemic[24].

While confirming this prohibition in the specific circumstances of the case, the Court considered the importance of the fundamental right of freedom of belief and, in particular, the guarantee of the free exercise of religion; in this context, the Court stressed, that the need for such a prohibition, must be strictly assessed in each case, in the light of the principle of proportionality, and considering the development of the pandemic[24]. A few weeks later, the Court was called to decide on the legality of holding religious events during the Ramadan period. The request was accompanied by specific proposals on precautionary measures. By means of an interim order, the Federal Constitutional Court suspended the provision of the State of Lower Saxony, which was prohibiting meetings to worship together, insofar as this provision did not allow for exceptions. The provision was suspended on the grounds that such a blanket prohibition would risk undermining the right to freedom of belief - in particular, the guarantee of the free exercise of religion. The Court stressed that the suspension was ordered in view (a) of the specific circumstances of the case, (b) the evolution of the pandemic, and (c) the fact that the religious community had taken adequate protective measures[25].

[23] South Bay United Pentecostal Church and Harvest Rock Church v. the Governor of California, No. 20A136 (20–746), 592 US (2021).

[[24] Bundesverfassungsgericht, order of 10/04/2020, 1 BvQ 28/20.

[25] Bundesverfassungsgericht, order of 29/04/2020, 1 BvQ 44/20.

Dear Colleagues and Friends,

During the sanitary crisis, restrictions on freedoms have had to be constantly balanced against the need to protect life, and public health. Unfortunately, the pandemic will be partly remembered as yet another occasion when legal issues got tangled up with politics - or even misprints of politics.

In the light of the above-mentioned case law, let me point out the following:

First - There can be no one-size-fits-all case-law. When Montesquieu quoted that 'judges are the mouthpiece of the law', not only did he mean that judges should merely interpret the law, rather than legislating themselves; he also meant that judges are charged with specifying the legislator's will, after considering all the relevant data, and weighing the competing interests. In this context, let alone in times of crisis, it is almost beyond certainty that a great part of the population will be critical. For instance, the Greek Council of State was criticized for showing deference when it came to the religious freedom, and the freedom of assembly; at the same time, the Court was blamed for choosing to stand up and being an activist, after asking the Government to re-evaluate whether the latest epidemiological data justify the suspension of duties of the unvaccinated health workers.

Second – Separate Law from Politics. The growth of the internet, IT, and legal databases created unprecedented potential for comparative research. Nevertheless, just reding the wording of a court's decision (especially, a foreign one's), may turn out to be misleading, without considering the merits of the case, the allegations presented, and the particularities of the substantive and procedural law. For instance, many of the orders of the Conseil d' Etat referred to above, were issued by means of a special interim injunction, provided for solely in the French rules of procedure; this turns the comparative study of these cases into a complex issue.

Third, and last – One of the main elements of Justice, is its separation from politics, and its scientificity. Therefore, it is inappropriate to evaluate the court's rulings in political terms, rather than considering the court's precedents, the legal doctrines created, and the merits of the case. Especially in times of crisis, the other way around may turn out to be dangerous, much more than unacceptable.
Thank you for your attention, and for your very warm hospitality.

PRISCILLA JENSEL-MONGE

Associate Professor

THE ROLE OF PARLIAMENTS IN TIMES OF CRISIS

The subject I am going to deal with here is the role - and I stress the word role - of Parliament in times of crisis, a question which is distinct, a priori, from the question of the functions of Parliament, even if the two are not totally independent. Discussing the role of Parliament is measuring its influence and action in a crisis context... It is therefore to discuss its constitutional or constitutionalized functions, but also its informal, non-constitutionalized functions. This means accepting that Parliament's functions cannot be reduced to the text, or to the functions that appear in the Constitution or are expressly recognized to Parliament.

Walter Bagehot showed, for example, that Parliament performed five main functions and that there was therefore an invisible work of Parliament (which we will observe here in times of crisis): *the watching and checking function, or oversight function, (the most important function of the parliament), which means overseeing the government's political action; *the expressive function, the expression of the people's opinion. The idea that parliamentary debates are not "mere chatter" but fulfil a real function; *the informative function, which involves providing objective and official information to people; the teaching function, which means forming public opinion; and lastly, the legislative function (including financial matters), voting the law.

Dealing with the question of the role of Parliament in times of crisis is the same as questioning the exercise of the functions it assumes during these periods when special legality is established in the light of exceptional circumstances.

In France, the constitutional functions of Parliament are set out in Article 24 of the Constitution: "Parliament votes on the law. It supervises the action of the Government. It evaluates public policies". Is there one function that predominates in times of crisis? Does this change in relation to "normal" periods, periods without crisis? In other words, is the balance between the legislative function and the control function different in times of crisis?
The aim here is to show that, far from upsetting the traditional balances between Parliament's constitutional functions in times of crisis, crises amplify the division of functions between the power to rule (vested in the executive) and the power to prevent (vested in the legislature), according to the traditional distinction established by Montesquieu. It will also be shown that, contrary to widespread opinion (including in academic circles), Parliament has not disappeared in times of crisis, and even that the latter has served as a basis for the development of other functions of Parliament (I). Secondly, I propose to analyze the informal functions of Parliament in times of crisis, using Bagehot's 'invisible' functions as a starting point. I will show that crises have probably had lasting consequences for the functions and functioning of Parliament outside periods of crisis (II).

I. The prevalence of the oversight function in times of crisis

After demonstrating that, contrary to widespread belief, the French Parliament has been very active during periods of crisis, particularly in oversight, I will attempt to draw lessons from the various crises for Parliament's oversight function and, more broadly, for the institutional and functional balances that they have revealed.

A. Oversight, Parliament's essential function outside times of crisis

The oversight function is the traditional function outside times of crisis. Bagehot puts it first. It is the cornerstone of the new separation of powers and a characteristic element of the parliamentary system. For Mill, "Instead of the function of governing, for which it is radically unfit, the proper office of a representative assembly is to watch and control the government".

In France, the importance of the control function was dedicated in the constitutional amendment of 23 July 2008, presented as a strengthening of Parliament in the institutions of the Fifth Republic.

Article 24 of the Constitution now states that "Parliament votes on the law. It oversees government action. It shall evaluate public policies". Before 2008, it simply stated that "Parliament votes on the law". Only the legislative function was mentioned. In a bid to reaffirm Parliament's role in 2008, Article 24 was therefore amended with the implicit idea that Parliament's main role was now to oversee the Government. The functional balances are thus defined: the Government, under the authority of the President of the Republic, determines and conducts the policy of the Nation (article 20), Parliament votes (just vote, it's important) and controls the action of the Government.

This evolution of the Constitution was made necessary by the weakness of parliamentary control, a weakness that can be explained in part by the jurisprudence of the Constitutional Council, which, for a long time, equated parliamentary control with responsibility and therefore with sanction. This is linked to the rationalized parliamentary system established by the Constitution of the Fifth Republic and the consistent interpretation given by the Constitutional Council.
Therefore, there were two opposing conceptions of parliamentary control: a strict conception and a broad one. In the strict conception, parliamentary control is confused with formal responsibility, itself associated with sanction. This is the view that results from the Constitutional Council's consistent interpretation of the relevant provisions of the Constitution. This position has been called into question by academic writers and by the assemblies themselves, since parliamentary scrutiny is seen more broadly as the set of instruments that enable parliamentary assemblies to monitor the action of the Government and, if necessary, to sanction it by invoking the procedures of Article 49 of the Constitution. Holding the government accountable is therefore simply one of the consequences of parliamentary control.

The crisis has shed light on the concept of parliamentary control and clarified the contours of this function, as we will now see. It also raises questions about the division of legislative and oversight powers between the executive and the legislature in the specific context of the crisis.

B. Oversight, a function exacerbated in times of crisis

Unsurprisingly, security and health crises have led to a clear shift from legislative power (in the material sense) to executive power (in the organic sense), due to the urgency of the situation and a presumption of effectiveness and responsiveness (which is debatable) on the part of the executive. It should be remembered that the Vth Republic has, in its DNA, the idea that the executive must have the capacity to overcome major crises. We therefore observed a very rapid legislative process (demonstrating that Parliament can move quickly) with texts adopted by unusually large majorities, very short adoption times, with a very short parliamentary shuttle (sometimes just one reading in each chamber), agreements between MPs and the Government not to refer legislation to the Constitutional Council (at least for the first few laws), a deliberate disregard for constitutional provisions in the adoption of organic laws (under the benevolent eye of the Constitutional Council), etc.

During this rushed legislative process, Parliament's role was clear: it was to support the executive in its decisions, to give meaning to Article 24, which states that "Parliament shall merely vote the law", without really deliberating. It was not a time for political confrontation but for "assistance" under the guise of national political unity.

On the other hand, Parliament succeeded in imposing an exceptional level of control on the various laws (particularly the laws governing the state of emergency), which was not provided for either in the Constitution or in the Assembly's rules of procedure. This was particularly visible in the context of the security state of emergency.

For example, when the Law of 20 November 2015 was being drafted, which extended the state of emergency for the first time, an amendment by the rapporteur Jean-Jacques Urvoas introduced an Article, article 4-1 (four dash one), under which "The National Assembly and the Senate shall be informed without delay of the measures taken by the Government during the state of emergency. They may request any additional information as part of the monitoring and assessment of these measures". This article was introduced by parliamentary amendment. Parliament's powers of scrutiny have therefore been strengthened, in addition to the traditional instruments already in existence. This provision gives Parliament the power to order the Government to provide any information it deems necessary.

When the law of 21 July 2016, which extended the state of emergency for the fourth time, was drafted, Parliament again used the law to strengthen its powers of control over the implementation of the state of emergency. The Chairman of the Committee on Constitutional Law, Legislation and the General Administration of the Republic, Dominique Raimbourg, proposed amending Article 4-1 (dash) by adding the following: "The administrative authorities shall transmit to them without delay copies of all the acts they take in application of this law". This amendment was adopted against the firm advice of the Government.
The same situation was observed with the law strengthening internal security and the fight against terrorism, which incorporated part of the state of emergency into ordinary law. Parliamentary control was imposed by law against the advice of the Government.

In all three cases, the fact that the matter had not been referred to the Constitutional Council in advance made it possible to introduce these exceptional control measures, as in these cases it was foreseeable that the Constitutional Court would censure the measures. The two chambers of Parliament also used the traditional instruments of parliamentary control available under the Constitution and the rules of procedure of the parliamentary assemblies: questions to the Government, parliamentary committees of enquiry, mission of information, etc. In the most acute phase of the crises, Parliament therefore ensured permanent oversight of the Government's action.
In the context of the health crisis, for example, each chamber immediately implemented a main instrument for monitoring the health crisis.
Thus, on 17 March 2020, even before the law was promulgated, the Conference of Presidents of the National Assembly decided to create a mission of information on the management and consequences of the Coronavirus-COVID-19 epidemic in all its dimensions.
The same applies to the Senate, where it was the Law Commission that decided to set up a mission to monitor measures relating to the Covid-19 epidemic. For Philippe Bas, senator, "Parliament's oversight role is all the more necessary in times of crisis, particularly to ensure that the measures taken under the state of health emergency are proportionate and necessary. Our role is not only to check that the Government's action is in keeping with the legal framework laid down by the Emergency Act of 23 March 2020, but also to monitor the day-to-day application by the public authorities of measures that, while justified by the circumstances, are highly exceptional to ordinary law and restrict the freedoms of all individuals to protect the health of all".

The political control thus exercised was coupled with a more technical control exercised by another parliamentary body, common to both the National Assembly and the Senate: the Parliamentary Office for Scientific and Technological Choices.

Parliament has therefore fully assumed its constitutional role of control, including by imposing exceptional measures on the Government. Criticism of the weakness of parliamentary control undoubtedly stems from the confusion and ambiguity surrounding the notion of parliamentary control.

Although not always under epidemiological control, the crisis was under political control and, even more, under parliamentary control.

C. Lessons from the crisis for parliamentary oversight

Crisis situations have made it possible to clarify Parliament's oversight function.

The control exercised during these crises seems to respond to a profoundly different logic, which renews the very conception of the control function. First, while parliamentary control is traditionally oriented towards the idea of responsibility, the crisis changes both the temporality of control and its purpose.

Whereas it is mainly exercised a posteriori, by questioning the political choices of the executive, the crisis has led to the exercise of parliamentary control in two distinct phases.
In the first phase, this duplication of control takes the form of monitoring and informing Parliament. This is the monitoring phase. It corresponds to the critical phase of the crisis which implies, if we take up the martial speech of the President of the Republic, that there is only one commander.

This does not mean, however, that responsibilities will not have to be established later. This is only the first phase of the audit.
It is followed by a second, more incisive phase, designed to establish responsibilities.
At the same time, it should be noted that although the crises have not led to the political responsibility of the Government being called into question (for the reasons given), they have nevertheless led to the ministers' responsibility being penalized and to accountability being expressed before the electorate.

The separation of control into two distinct phases strengthens Parliament's oversight function. It profoundly transforms its temporality by giving it the permanence it lacked. This has already been observed in the fight against terrorism and seems to be a constant in government control in times of crisis.

The crisis has highlighted Parliament's determination to prepare for the post-crisis period through the follow-up phase. This will enable to exercise the second phase of political control, which is now twofold. But it must also serve to prepare the legislative phase that will follow the crisis.

The oversight function already serves the future legislative function and underlines the need to break down the artificial boundaries between the different functions of Parliament and to reflect, at last, on the true function of Parliament: the representative function.

So, we observed that Parliament does not perform a purely legislative function and, that there is also an "invisible" (i.e. not visible at first glance or not formalized) work of Parliament, which should be considered to assess its effective role.

II. The exercise of informal functions in times of crisis and the impact on non-crisis functions

Several lessons can be drawn from the crisis situations we have just been through. In particular, the use of digital tools in the workings of Parliament during a health crisis has been accelerated and developed on a long-term basis.
This has been the case since the health crisis, which prevented Parliament from meeting physically and forced it to develop digital tools simply, in the first instance, to carry out its constitutional functions: passing laws and overseeing government action. I just want to say now few words about the three informal functions of Parliament that we have not yet discussed: Informative function; Teaching function and Expressive function.

A. The informative function

Parliament's informative function, which consists of providing information to the public, has been made possible using information technology. For example, the assemblies have made available on their website's pages dedicated specifically to developments in the health crisis: various information reports, figures on developments in the health crisis, questions on the health crisis, etc.

Against a backdrop of the fight against false information and fierce competition for information from social networks, particularly during a health crisis, the assemblies have sought to fulfil their informative role. We should not be naïve in the sense that citizens who were not accustomed to consulting institutional websites probably did not go there during the health crisis. But the assemblies fulfilled their informative function.

We can go further and observe that the instruments deployed to function in times of crisis now serve as a support for the exercise of other functions of Parliament.

B. Parliament's teaching and expressive functions since the health crisis

First, it should be noted that the informative function continues to play its full role outside the crisis period. We can say a few words here about two other functions developed by parliamentary assemblies since the health crisis, based on the sustainability of IT resources: the educational function and the expressive function.

Just a few words to show how, since the health crisis, Parliament has used digital tools to develop these two functions. The teaching function is supported by several communication tools and policies of the National Assembly and the Senate. For example, with the development of educational tools aimed at younger people (dedicated pages on websites with games and quizzes), programs as the Children's Parliament, the creation of MOOCs, simplified and highly educational websites, etc. There is also a particularly developed communication policy on social networks to reach all audiences. The French Senate, for example, has chosen to be present on the main social networks, Instagram, TikTok, etc. The expressive function has also been developed. As the representative of the Nation, Parliament expresses the opinion of the people (at least in theory) by proposing and debating laws and by monitoring the action of the Government. But for some time now, this expression of public opinion has taken on a more direct dimension. For some years now, Parliament, whether the National Assembly or the Senate, has been encouraging citizens to participate directly, for example through e-petitions or by organizing citizens' consultations. The expression of public opinion is therefore direct.

In conclusion, it should be noted that the recent crises have reduced Parliament to the exercise of its constitutional function of control, which has been fully deployed despite the absence of any challenge to the Government's political responsibility.
But beyond this, and no doubt somewhat paradoxically, the fight against the recent crises has brought to light another profound crisis against which Parliament can fight more directly: the crisis of the democracy of representation.

THE ROLE OF JUDGES IN STRATEGIC LITIGATION. REFLECTIONS BASED ON THE EMBLEMATIC BELGIAN CLIMATE CASE (KLIMAATZAAK OR AFFAIRE CLIMAT)

VINCENT LEFEBVE

Researcher at the Centre de recherche et d'information socio-politiques (CRISP) and scientific collaborator at the Centre de droit public et social of the Université libre de Bruxelles (ULB)

> This case was launched in 2014 and is part of the development of strategic climate change litigation on a global scale.

The notion of strategic litigation and the cases that form its backbone is of great interest, as it makes it possible to question the democratic role of judges in a way that is not purely theoretical but based on specific cases. This angle of analysis is also very useful for understanding how individuals and groups use the legal resources to respond to situations that are socially and politically perceived as crisis situations.

I will focus here on the most emblematic Belgian climate case, called "Klimaatzaak" (or "Affaire climat"). This case was launched in 2014 and is part of the development of strategic climate change litigation on a global scale. In a first instance judgment, it was decided by a Brussels' Tribunal on 17 June 2021, before being appealed by its initiators, the NGO Klimaatzaak - in French "Affaire climat" - and more than 70,000 citizens[1].

This case was appealed because the first instance judgment was ambivalent. On the one hand, it recognised the fault of the Federal Authority and the three Regions involved (Walloon Region, Brussels-Capital Region, and Flanders Region), due to deficient climate policies and cooperation. But, on the other hand, the Tribunal did not draw any practical conclusions from this statement, and it did so to avoid violating the principle of the separation of powers.

[1] French-speaking Tribunal of First Instance of Brussels, 17 June 2021 (civ. – fourth chamber – RG n° 2015/4585/A), https://affaire-climat.be. See also the large extracts from the decision in le Tijdschrift voor Milieurecht, n° 4, 2021, p. 387-403, and the extracts published in Revue de jurisprudence de Liège, Mons et Bruxelles,
n° 8, 2022, p. 361-363 and in Revue générale de droit civil (Tijdschrift voor Belgisch Burgerlijk recht), n° 2, 2023, p. 97-99.

On 30 November 2023, the Brussels Court of Appeal handed down an awaited ruling in this case[2]. The appellants in the main proceedings obtained a decision that was much more favorable to them than the previous one. My aim here is to show that the Belgian climate case highlights the tensions that affect the role of judges when faced with a strategic litigation. To achieve this aim, I will first define the concept of strategic litigation and recall some of the stakes of the phenomenon of global climate litigation. Secondly, I will look at the most relevant features of the Belgian climate case as judged in first instance and on appeal. In a third part, I will consider the Brussels judges' involvement in a network of social and institutional actors. Based on this exploration of the Belgian climate case, I will finally look at the specific features of the democratic role of judges in the context of a strategic litigation.

I. Strategic litigation and climate litigation

In some social movements, the law can be used as a weapon to advance a political struggle: this is what is called strategic litigation. The fight against climate change is a particularly interesting example of this strategic use of law and justice.

I.1. Strategic litigation: the weapon of the law

The term "strategic litigation" is used in legal and sociological literature, especially in the English-speaking world, to refer to situations in which a specific case is used to pursue socio-political goals that go beyond the case itself[3]. In such cases, social movements aim not only to win a legal victory, but also to publicize an issue of general interest to gain political leverage. Strategic litigation reminds us that the legal rules and the various legal institutions can be used as tools or even weapons to achieve other social or political goals[4]. We can also refer to the etymological origin of the term "strategy": in ancient Greek, stratos means "army", while agein means "to lead", "to bring", "to push forward". This origin has left its mark on the various uses of the term, both ancient and more contemporary.

Comparison with the concept of cause lawyering is here relevant. One could define the cause lawyer as a social actor who combines his activities in the legal field with his activism, or as a person defending a cause in the public interest[5]. This could be a lawyer in the institutional sense of the term, for example a solicitor, or an NGO, an independent public body, a trade union, etc.

[2] Brussels Court of Appeal, 30 November 2023 (civ. – second chamber F – RG n° 2021/AR/1589 – 2022/AR/737 – 2022/AR/891), https://affaire-climat.be. See also the large extracts from the decision in Revue de jurisprudence de Liège, Mons et Bruxelles, n° 9, 2024, p. 356-390, and the commentary note: D. Philippe, I. Jeanmart, « À circonstances alarmantes décision exceptionnelle ! », p. 390-399.

[3] V. Lefebve, « L'Affaire climat (Klimaatzaak). Une mobilisation sociale entre droit, science et politique », Courrier hebdomadaire, CRISP, n° 2553-2254, 2022, p. 85.

[4] L. Israël, L'arme du droit, Paris, Presses de Sciences Po, 2009.

[5] A. Sarat, S. Scheingold (dir.), Cause Lawyering and the State in a Global Era, Oxford / New York, Oxford University Press, 2001.

A link with the question of legal culture can also be traced. We can recall the initial development of the practice of strategic litigation in countries with a common law tradition, and the fact that the phenomenon then has spread to countries with a civil legal tradition. In the same way, scientific interest in this notion began in states grounded in a common law tradition before spreading to other countries.

I.2. Global climate change litigation

The Sabin Center for climate change law in the University of Columbia in New York has a very interesting website that lists many current climate cases[6]. A distinction is made between the climate cases in progress in the United States (more than 2,000 cases) and those that can be identified around the world. In the rest of the world, the Sabin Center identifies around 1,000 climate disputes.

Such work presupposes at least a definition of climate litigation. One considers generally – and the Sabin Center refers to such a definition – that climate case law is composed with cases submitted to a judge raising questions of fact or law relating to climate change adaptation and mitigation policies[7]. Are notably considered actions seeking to challenge the responsibility of public or private authorities for global warming. Climate litigation is a field that is now well established in scientific literature.

II. The belgian climate case (Klimaatzaak/Affaire climat)

In the first place, it is relevant to present the Belgian climate case in the light of the Urgenda case in the Netherlands. After a long period of procedural lethargy, the Belgian climate case led finally to a decision in 2021. An appeal was introduced and, two years later, the applicants obtained a new decision on 30 November 2023, which was seen as a clear victory. These decisions are part of an activist strategy implemented by civil society, highlighting not only the insufficiently ambitious nature of the climate policies pursued in Belgium, but also the shortcomings of climate governance in Belgian federalism.

II.1. The Urgenda case

The Belgian climate case cannot be understood without reference to the Dutch case on which it is based, the Urgenda case[8]. In the early 2010s, it became apparent to environmental activists that mobilising ordinary civil liability law, coupled with recourse to the human rights register, was a promising way of making their climate claims succeed: the Urgenda case, named after the foundation behind the action, was launched in 2012 and 2013.

[6] See http://climatecasechart.com.

[7] The UNEP Global Climate Litigation Report, 2020 Status Review, p. 6, https://wedocs.unep.org.

[8] See in particular D. Misonne, « Pays-Bas c. Urgenda (2019) », in C. Cournil (dir.), Les grandes affaires de la justice climatique, op. cit., p. 207-221.

In 2014, the Klimaatzaak association was set up in the Dutch-speaking part of Belgium to transpose the strategy implemented in the Netherlands, with Dutch lawyer Roger Cox playing a role in both cases. Although the rules governing State liability in Belgium and the Netherlands are the same as those that apply to civil liability, the two contexts are far from similar: on the one hand, the Netherlands is a unilingual, unitary, and relatively centralised State, while, on the other hand, Belgium is a multilingual federal State with a particularly complex institutional structure[9]. While the Dutch case progressed rapidly and resulted in three successive judicial victories for his initiators, the Belgian climate case somehow was blocked for three long years due to a procedural incident linked to the use of languages in judicial matters.

II.2. An ambivalent first instance decision

Once this "trial within a trial" was over, the case began on the merits in 2018, culminating in a decision by the French-speaking Tribunal of First Instance of Brussels on 17 June 2021. As indicated before, this decision was ambivalent: while the Tribunal recognised the fault of the State, in both its federal and regional components, it did not draw any practical conclusions from this.

[9] J. Faniel, C. Istasse, V. Lefebve, C. Sägesser, « La Belgique, un État fédéral singulier », Courrier hebdomadaire, CRISP, n° 2500, 2021.

The Tribunal certainly found that the components of the State concerned were at fault, having violated both the general duty of care incumbent on them and the human rights of the applicants, but it refused giving the Federal Authority and the three Regions quantified targets for reducing greenhouse gas emissions, in the name of the principle of the separation of powers: "The extent and pace of Belgium's reduction in greenhouse gas emissions and the internal distribution of the efforts to be made in this direction are and will be the result of political arbitration in which the judiciary cannot interfere. (…) In other words, while it is the role of the Tribunal to find that the Federal State and the three Regions have failed to act, this finding does not authorize it, by virtue of the principle of the separation of powers, to set by its own targets for reducing Belgium's greenhouse gas emissions"[10].

Considering the Belgian case, and without going into the technicalities of this legal debate, it should be noted that one of the crucial questions addressed in this case was that of the admissibility of an injunction to act addressed to a public authority.

[10] French-speaking Tribunal of First Instance of Brussels, 17 June 2021, op. cit., p. 82.

The injunction to act, and more specifically the call for a more ambitious climate policy, addressed by the judiciary power to the Dutch state, was indeed the very centre of the victory obtained by the civil society in the Urgenda case. As we see, the Brussels' Tribunal remained cautious in this respect. However, it could have drawn on a Belgian legal doctrine, inspired by the Urgenda caselaw, that had proposed a different reading of the principle of the separation of powers. This doctrine invites to distinguish on the one hand, indicating to a public authority a goal to be achieved, which would be admissible; and, on the other hand, ordering specific measures to achieve this objective, which the principle of the separation of powers would prohibit[11]. After 17 June 2021, these same authors deplored the Brussels judge's excessive caution, while another, a specialist in tort law, said he understood the "unease" felt by the judge about the limits of his action in this case[12]. The Belgian legal doctrine thus showed contrasting expectations about the "politique jurisprudentielle" ("case-law policy") to be promoted in this case.

[11] See for instance N. Bernard, S. Van Drooghenbroeck, I. Hachez, C. Jadot, A. David, A. Picqué, C. Langlois, B. Gomes, « Urgenda : Quelles leçons pour la Belgique ? », Administration publique, n° 1, 2021.

[12] B. Dubuisson, « Responsabilité civile et changement climatique. Libres propos sur le jugement rendu dans l'affaire "Klimaatzaak" », in F. George, B. Fosséprez, A. Cataldo (dir.), Penser, écrire et interpréter le droit. Liber amicorum Xavier Thunis, Bruxelles, Larcier, 2022, p. 259-286.

II.3. The appeal: a clear victory for the civil society

On the judicial front, and from the point of view of its initiators, there is no doubt about the success achieved on appeal in the Belgian climate case. The NGO Klimaatzaak was immediately able to emphasize that the ruling by the Brussels Court of Appeal was "a clear victory" which should make it possible to draw a "definitive line" under the inadequate climate policies of the governments concerned[13].

If the decision handed down at first instance was generally praised for the quality of the legal arguments put forward, with the first judges drawing on a wide range of sources, both scientific and strictly legal, the ruling handed down by the Brussels Court of Appeal in the same case is in line with this approach and even reinforces it. An author even describes it as "a landmark decision that will live on in law courses and textbooks"[14]. Throughout the 160 pages of this decision - which the NGO Klimaatzaak immediately posted on its website, as it does with all the procedural documents in its possession since the origins of the appeal – the Court details the factual elements to be taken into consideration and the reasoning behind the legal decision it reaches.

[13] « L'Affaire Climat gagne ! Vous avez GAGNÉ ! Nous avons gagné, tous ensemble, à 70 536 ! », Affaire climat's website, 30 November 2023, https://affaire-climat.be.

[14] D. Philippe, I. Jeanmart, « À circonstances alarmantes décision exceptionnelle ! », op. cit., p. 390.

References to judgments handed down by various high courts in other countries can also be found throughout the pages, reflecting the will of the magistrates of the Brussels Court of Appeal to be part of a cross-border case-law movement resulting from the questioning, on the initiative of NGOs and citizens, of the responsibility of private operators or public authorities for a lack of ambition in the fight against climate change, by means of various jurisdictional strategies that are being deployed in many countries.

The Court of Appeal proceed in stages. To respond in law to the pleas put forward by the appellants, the Court make a distinction between the plea based on human rights and the plea based on the law of civil liability. In the section relating to human rights, Article 2 (right to life) is examined before Article 8 (right to private and family life), with the Court providing timely clarifications concerning the direct effect of these provisions in the domestic legal order and concerning the positive obligations that they are likely to give rise to on the part of the public authorities. Finally, the Court of Appeal looks at the situation from different temporal angles, assessing the respect due to human rights during the period of international and European commitments from 2013 to 2020, and then considering a second period, extending from 2021 to 2030.

In the latter case, the aim is to assess the public policies adopted or intended to be adopted by the State components to "do their part"[15] in the fight against climate change in the future, and particularly by 2030 (an important intermediate stage in achieving the objective of carbon neutrality set for 2050 at the European Union level).

The Court confirms the decision of the Tribunal as far as it found that the Federal Authority, the Flemish Region, and the Brussels-Capital Region had violated the human rights of the appellants as natural persons[16] and breached the duty of care through their conduct, thereby applying the ordinary rules of tort law. On the other hand, the Court exonerates the Walloon Region. In particular, the Court took into consideration the fact that the Walloon Region had legislated in this area since 2014 and achieved the objectives set by its own legislation[17].

Concerning the request for an injunction to act, the Brussels Court of Appeal is clear: receiving this plea does not mean violating the principle of the separation of powers.

[15] Brussels Court of Appeal, 30 November 2023, op. cit., p. 84.

[16] However, the Court overturned the first judgment as far as it found a violation of the human rights not only of the natural persons, but also of the non-profit association Klimaatzaak.

[17] See the 20 February 2014 Walloon "climate decree" (Moniteur belge, 10 March 2014).

“

However, an examination of the case leads the Court to limit this injunction to the three components of the State whose conduct is being criticized (on the dual basis of Articles 2 and 8 of the European Convention on Human Rights, on the one hand, and the rules of domestic law governing civil liability, on the other). The Walloon Region, on the other hand, is not concerned, as far as it has pursued - and appears to continue to pursue - a climate policy deemed not to be at fault by the Court.

This injunction also corresponds to a reduction threshold of -55 % in 2030 compared to 1990 emissions, which is below what the appellants requested, but above what formally derives from Belgium's international and European obligations (in the so-called non-ETS sectors, all the Member States of the European Union are bound by an overall threshold of -55 % - in 2030, compared to the 1990 level -, while Belgium itself is subject to a greenhouse gas reduction threshold of -47 % - in 2030 and compared to 2005). To arrive at this result, the Court of Appeal develops a lengthy argument that consider the current scientific consensus on these issues and examines them in the light of the relevant international and European law. The Court considers that this threshold constitutes a "minimum minimorum [...] below which Belgium cannot go without failing to comply with [the European Convention on Human Rights]"[18].

[18] Brussels Court of Appeal, 30 November 2023, op. cit., p. 105.

Finally, the Court settles in principle the question of penalty payments. The ruling indicating that the Court does have this power, but it decides to defer ruling on this point until it receives more information from the three components of the State at fault on the figures for greenhouse gas emissions from 2022 to 2024.

II.4. The applicants: a coordinated action by civil society

Beyond the legal technicalities of the case, the instigators of the emblematic Belgian climate trial intended to reach a wide audience by using it as a political platform. This case is thus exemplary of the new practices that can be observed in social movements, of a new relationship with law and justice, which is linked to new publicity and communication strategies.

The Belgian climate case is supported by an NGO, but also by individuals - nearly 60,000 persons in first instance and more than 70,000 people in appeal - who gave the legal action added popular legitimacy. This public participation is particularly massive. It is also "sponsored" by personalities from civil society, and even from the entertainment world, who act as ambassadors for the case.
Finally, it is linked to other social actions in favour of the climate, such as the youth movement demanding ambitious climate policies, that has been particularly visible in Belgium in 2019.

The question of the status of applicants in the Belgian climate case has also arisen from another perspective, with an attempt during the first trial to involve different trees in the proceedings through a legal representative. This representation of the rights of nature in the proceedings was mainly symbolic, as there is no legal basis for it in Belgian law, as the Tribunal pointed out in its decision of 17 June 2021. However, it is interesting and echoes long-standing theoretical discussions[19], as well as more recent political and legal initiatives, where legal personality has been conferred on natural entities, notably in New Zealand and Colombia.

II.5. The defendants: the climate case put to the test of Belgian federalism

If we consider not the applicants but the defendants, another important aspect of the decisions of 17 June 2021 and 30 November 2023 is the harsh judgement passed on Belgian climate governance. The question of the effectiveness of the climate policies pursued in Belgium brings us to the heart of what is known in Belgium as the "question linguistique" ("linguistic issue") or "question communautaire" ("community issue"), which refers to the structural opposition in this country between French and Dutch speakers.

[19] C. Stone, « Should Trees Have Standing? Towards Legal Rights for Natural Objects », Southern California Law Review, n° 45, 1972, p. 450-501.

Although the social actors who initiated the Belgian climate case are hoping that Belgium's climate strategy goes beyond this divide, this is certainly not the case in practice. In addition to the fact that the case had to wait three years before being tackled in depth, as already mentioned, following a request by the Flemish government for a change of language, the Belgian climate case involved, more fundamentally, raising the question of the effectiveness of cooperation on climate matters within federal Belgium. While the international aspects of climate change are often approached in terms of the strengths and limits of multilateralism, we must not overlook the need for internal cooperation in multi-level states and particularly in divided society as Belgium. Belgium's institutional structure is particularly complex. At least four components of the State are responsible for climate issues: the Federal Authority, that is the central level of power, and three of the eight federated entities that make up Belgium, namely the three Regions (Flemish Region, Brussels-Capital Region, and Walloon Region).

The deficient nature of this governance, noted by several authors and even by some of the political leaders themselves, was considered by the Brussels jurisdictions as part of the common fault of the various components of the State sued. These components of the State have not implemented the measures that would have enabled Belgium to speak with a single voice on the international stage. They have not act in a way that would have led to a clear and equitable intra-Belgian distribution of the burden resulting from Belgium's international and European commitments.

“

This extract from the judgment rendered in first instance is particularly explicit: “In short, cooperation between the federal authority and the federated entities is, by the admission of various state bodies and to this day, deficient, which leads some authors to consider the climate governance framework to be fundamentally unsuitable”[20]. In a case involving a tort question, the judges were thus led to assess a question of constitutional law, and even to assess the very mechanism of federalism.

Poor climate governance is a long and somehow sad story in Belgium. Despite the existence of numerous bodies tasked with promoting intra-Belgian climate cooperation, the concrete results have been disappointing. The ideological contrasts that exist on a strictly political level do not help matters. Currently, of the four ministers in charge of the climate policies, three are from the French-speaking green party Écolo, while the Flemish minister of environment, Zuhal Demir, belongs to a nationalist party which tends to put Flanders’ economic interests ahead of the goals that Belgium must achieve in the fight against climate change.

If we focus on the Federal level and the Federal Minister for Climate, Zakia Khattabi, we can observe that a few years ago she was an applicant in the Belgian climate case. She had to renounce this status, as she would have been in a way both applicant and defendant in the same case.

[20] French-speaking Tribunal of First Instance of Brussels, 17 June 2021, op. cit., p. 82.

When the November 30 decision was handed down, Z. Khattabi affirmed that the November 30 ruling was one of the “levers for strengthening and giving credibility to [Belgium’s] climate policies”[21]. On the other hand, the Flemish Minister for the Environment, Z. Demir, considered the November 30 ruling to be a violation of the principle of separation of powers and a threat to the Flemish economy. The N-VA minister went on to say that the “good copy” rendered by Wallonia, according to the court, results from poor economic dynamism of this Region. Finally, according to Z. Demir, not only a judge, but also a “French-speaking judge” has no business interfering in such political choices[22].

The accusation of the “government of judges” while long-standing and therefore well documented, is currently on the rise. This line of argument was already perceptible in the reaction of the minister from the ranks of the N-VA to the first ruling in the Climate Affair. Z. Demir, welcoming the decision taken by the court of first instance, considered that the court “by not bending to the bidding of percentages” had “made the right decision” - that is a decision that respected the separation of powers. She also praised the court’s determination not to follow the path of the Urgenda case-law, which, according to the Minister, had led not to a legitimate decision but to a “diktat”[23].

[21] Le Soir online, 30 November 2023, www.lesoir.be.

[22] De Morgen online, 30 November 2023, www.demorgen.be.

[23] De Morgen online, 18 June 2021, www.demorgen.be.

Z. Demir, by denouncing the 30 November 2023 ruling as the expression of a "government of French-speaking judges", seemed to be taking a further step in the process of "communautarisation" of the Affaire climat. It was therefore hardly surprising that the Flemish Minister announced her intention to lodge an appeal in cassation against the ruling of the Brussels Court of Appeal, as well as her wish that the Federal Authority and the Brussels-Capital Region join her in exercising this right of appeal. The victory won by civil society on appeal in the climate case, which is undeniable in legal terms as mentioned above, seems therefore questionable from a strict political point of view.

III. Judges faced with climate litigation: actors at the crossroads of several social and institutional expectations

The pattern that emerges from the analysis of the Belgian climate case is certainly not the same as that found in all cases of strategic litigation, but it is a general pattern that seems to be operational in most situations, with some variations. The judge appears as an actor at the crossroads of the demands made on him by a multiplicity of social or institutional actors, demands or expectations which are often contradictory, but which may appear legitimate in their respective fields.

In addition to the actors who were formally involved in the case, there were a relatively large number of other actors who participated in the legal and socio-political process of turning it into a "case" - I mean into what is called in French "une affaire", as we speak of the "affaire Dreyfus" or of the "affaire du sang contaminé" -: scientists, academics, the media, public opinion, environmental activists, NGOs, committed citizens, cause lawyers, legal doctrine, foreign judges or judges sitting in international courts, etc.

In this networked legal game, the judge is just one link in a chain that is both interpretative and decision-making, since the climate case has been appealed. The appeal ruling is itself appealed to the Supreme Court - "Cour de cassation" - so that the highest court in the Belgian judiciary system rule on the question of principle it raises, that of the scope and limits of the principle of the separation of powers. Bearing in mind that the human rights dimension of this case could bring it afterwards before the European Court of Human Rights.

The issue of climate emergency also raises the question of the temporality of the law in relation to other social temporalities. While judges cannot remove themselves from society and the debates that shape it, as public officers, they are inevitably immersed in a different kind of temporality, punctuated by procedures and the completion of formalities.

Sign of the change in approach regarding the law already mentioned, social actors who use the weapon of law to put forward their militant and political agenda seem to understand the potential advantage of this gap between social time and legal time. While at first sight this gap appears to be a major difficulty of using the law for political ends, the long-time frame of the law can sometimes be a strength, for instance when the media is saturated with other issues. In this way, the Belgian climate case continued to exist underground when the pandemic crisis and its effects came to occupy a large part of the political and media space. In 2021, the hearings and then the decision of 17 June put the issue of climate change back at the forefront of the media agenda. Irony of fate, this issue will come to light dramatically a few weeks later when Belgium was hit by the very serious floods of July 2021. These events increased the instigators of the Belgian climate case in their determination to go to appeal.

Returning to the role of the judge, another question arises, which is presented here in a dramatic light: since a case brought before the courts is the vehicle for a more general question, which is the very definition of strategic litigation, what influence can certain events have on the judge's decision? Would the decision handed down in the Belgian climate case have been different if it had been handed down not in June 2021, but in August 2021?

That is after the floods that traumatised public opinion in Belgium, and in particular French-speaking people who were particularly affected. Events of this magnitude have a deep effect on the state of public opinion, to which the judge is connected, not in the sense that he is the voice of public opinion, of course, but in the sense that the context of a case is somehow the environment in which are immersed the legal issues that the judge must decide.

IV.Conclusion: the democratic role of judges faced with strategic litigation

Focusing on the Belgian climate case led me to explore the long-standing but still crucial question of the political role of judges in democracy. I have tried to show that the judge is at the crossroads of various demands, expectations and interventions coming from different social or institutional actors. But judges are also at a sort of crossroads between different social and political positions. On the one hand, some people would like them to take on the role of activists, which would place them at odds with their constitutional mission. On the other hand, certain decisions seem to relegate judges to the status of powerless witnesses to political processes marked by procrastination and a lack of ambition by the public authorities.

Analysis of the climate cases shows that between these two positions, a horizon is emerging in which the judge can play an intermediary role as a "political switcher"[24]. By using this expression, I mean a democratic actor who, by applying the law and the legal principles to the case submitted to him, and taking account of the context in which it is set, can point the public authorities in a direction to follow. In doing so, the judge has not to develop heterodox or dissident interpretations of the law. Furthermore, he must not and should not take the place of the legislative and executive powers. But he must certainly interpret law in the light of both the principles that shape it and the unprecedent events that test it.

In the Belgian climate case, the judges certainly did not venture into the territory of judiciary militancy. And far from confining themselves to a purely defensive position, they assessed the authorities' climate policies from the point of view of human rights and the rules governing the responsibility of public authorities. In this respect, the Court of Appeal in Brussels went further than the first judge and considered that it could issue an injunction to act, by setting, very carefully, regarding the three authorities found responsible, a precise threshold for reducing greenhouse gases by 2030. In other words, the court found that doing so, it could fully play its role of political intermediary or political switcher.

[24] V. Lefebve, « Témoin impuissant, acteur militant ou aiguilleur politique ? Le rôle du juge en démocratie à la lumière de l'"affaire climat" », e-legal, revue de droit et de criminologie de l'Université libre de Bruxelles [online], vol. 7.

In this balancing process, two symmetrical pitfalls seem to threaten the judge. On the one hand, as we noted above, that judges reinforce the position of those who denounce the emergence of a "government of judges". This threat is currently more fantasised than attested. However, it is beginning to penetrate our democratic imaginations that are under great stress in this period of multiple and intertwined crises. Some political and social actors seem indeed to see in any progress in case law a trespass of power by democratically illegitimate judges.

On the other hand, there is a second pitfall that threaten judges, that is the fact that trough cautious decisions, or decisions perceived by a part of the population as such, the judges are fostering what I would call - drawing on the reflections of the French philosopher Bruno Latour - a "don't look up" effect, from the name of the famous movie. According to this narrative, climate change would not be what a part of the doctrine is calling a "wicked problem", that is a problem particularly difficult to address politically because of the multiple issues at stake and the various perspectives on it. Rather, climate change would be a "simple problem", so that the failure to resolve it could only be attributed to a lack of political will or even political courage. Although the NGO's and the citizens involved in strategic litigation generally perceive a legal defeat as a stage in a long political struggle, the failure of legal proceedings – or their lack of concrete effects – could be perceived as proof of the resignation of the State, considered in all its components, in the face of an increasingly pressing climate emergency.

The question that sometimes emerges today in the public debate is as follows: will judges save us from climate change? I think the answer is clearly no. But justice have the potential to contribute to this complex task of mediating between antagonistic social narratives. Because it is a collective work founded on principles. Because justice ultimately is based on the judge's faculty to judge, that is its capacity to form an autonomous judgement that is at the same time founded in law. Because caselaw is rooted in tradition but is also able to shape the future interactions between the citizens and between the citizens and the public authorities. In one word: because the decisions that make judges are legal in their nature, but also political in their implications.

Climate litigation in France:
WHAT CHARACTERISTICS, WHAT ALTERNATIVES?

Clémentine-Eleni Nikolaidis-Lefrançois

PhD Candidate - Aix Marseille Univ.

Summary

This article provides a brief overview of French climate litigation. It examines the latter through the lens of the anthropocentric, substantial and institutional, foundations of the French legal order. This allows to explain the potential and weaknesses of climate litigation in France and to explore alternative and complementary legal solutions to cope with the climate crisis.

Climate change can be conceived as the main topic of litigation or just as a factor to be taken into consideration in cases concerning environmental protection more generally[1]. This presentation[2] focuses mainly on the first possibility, climate change as the central object of litigation in France. In addition to that and even if there are some cases concerning climate litigation against private actors[3], only climate litigation against the State will be dealt with hereinafter[4].

[1] Lormeteau B. and Torre-Schaub M., "Du nouveau dans le contentieux climatique – Des réponses temporelles et plurielles à l'urgence climatique", R.J.E., 2022, no. HS21, p. 261, online https://www.cairn.info/revue-juridique-de-l-environnement-2022-HS21-page-257.htm (retrieved on 25 February 2024) ; Torre-Schaub M., "Climate Change Litigation and Legitimacy of Judges towards a ' wicked problem ': Empowerment, discretion and prudence", French Yearbook of Public Law, 2023, no. 1, p. 136, online https://fypl.fr/wp-content/uploads/2023/10/FYPL_ISSUE1_2023.pdf (retrieved on 25 February 2024).

[2] This article constitutes a presentation of the main questions on climate litigation in France. It aims to provide to foreign students a brief overview of the main French scholarship on the topic.

[3] Cf., for example, French caselaw on the liability of private actors, such Total Energy, for not complying with its obligation of information stemming from its duty of care provided for by French law, cf. Lormeteau B. and Torre-Schaub M., "Du nouveau dans le contentieux climatique – Des réponses temporelles et plurielles à l'urgence climatique", op. cit. note 1, p. 265-266. For an overview of French climate caselaw, cf. the Global Climate Change Litigation Database of the Columbia Law School, 2024, available on https://climatecasechart.com/non-us-jurisdiction/france/.

[4] Climate litigation against the State is considered to be currently the most strategically appropriate approach in the French legal order, because it could lead the State to adopt a stricter legislation on private actors' climate responsibility, cf. Portier C., "Le contentieux climatique en droit français : quel(s) fondement(s), quelle(s) responsabilité(s) ?", R.J.E., 2020, vol. 45, no. 3, p. 465-473, online https://www.cairn.info/revue-juridique-de-l-environnement-2020-3-page-465.htm (retrieved on 25 February 2024).

Climate litigation concerns a particular crisis, the climate crisis. Unlike other crises, such as those linked to terrorism, health or financial questions, the climate crisis has the specificity that, despite being global, its manifestations are not as immediate and rapid as those of other types of crises. In fact, there are some parts of the world that are more exposed to the consequences of climate change than others. This is why climate change does not evolve in the same rhythm in every part of the world and, therefore, the emergency to act against its consequences is not perceived in the same degree by all. Moreover, response to climate change imposes most of the time the adoption of unpopular measures which are difficult to accept. In sum, being a long-term phenomenon with long-term consequences, climate change does not fit easily into the classic patterns of emergency regimes. All these factors have, for a long time, challenged the development of climate action, whereas climate change is a well-known phenomenon since decades now. However, in recent years, civil society increasingly demonstrates its desire to reverse this situation. One of the methods chosen to this direction is climate litigation.

Considering this context, the question arises quite naturally: is climate litigation an appropriate legal tool in order to deal with climate change in France? The response to this question can only be nuanced. First, it is necessary to clarify the anthropocentric point of view of French law (I) and its consequences on both the situation and the limits of climate litigation in France (II). Then, it is appropriate to explore possible alternatives to climate litigation (III). The thesis put forward here, as a conclusion drawn from the answers to these questions, is that climate litigation can be a piece of the solution in France, but, probably, not the most important one.

I .The anthropocentric foundations of the French legal order

The first element that must be taken into consideration when addressing climate litigation in France is a question of context, regarding the predominantly anthropocentric approach of human-nature relations on which French law is based. More precisely, this approach manifests itself into two levels, both explaining the inertia of France (and, more generally, of western States) concerning climate change in the first place.

A. The substantial level

The first level is substantial. It concerns ethical choices reflected in the legal order and illustrates what an anthropocentric approach is.

Climate change is not a new phenomenon taken into consideration by French law. On the contrary, "climate emergency" is much more recent. This notion appears for the first time in 2019 in the French Energy Code as a challenge for the national energy policy[5]. However, some authors[6] point out that the relevant provisions have had for a long time a rather declaratory function. In other words, the authors explain, this corresponded more to a recognition of the need to act than to a real implementation of emergency measures.

[5] Both articles L. 100-1 A and L. 100-4 of the French Energy Code refer to the need to "respond to the ecological and climate emergency", Lormeteau B. and Torre-Schaub M., "Du nouveau dans le contentieux climatique – Des réponses temporelles et plurielles à l'urgence climatique", op. cit. note 1, p. 259.

[6] Ibid.

This is quite understandable, since acting in order to deal with climate change implies a shift in the current economic, legal and social paradigms[7]. More precisely, the adaptation of current models to climate necessity implies, most of the time, the adoption of drastic and, thus, rather unpopular measures. A simple example would be the obligation to take the train rather than the plane for short journeys[8]. But, of course, other measures, much more severe, would be necessary.

These measures call into question the current predominantly anthropocentric approach of human-nature relations. The term "anthropocentric" comes from the combination of Greek words "Anthropos" (which means human being) and "kentron" (which means center). Therefore, an anthropocentric approach consists in putting the human being at the center of the reflection. In matters of environmental law, it means that if the law choses to protect the environment, this environmental protection is perceived as indispensable for the protection of human beings.

In conclusion, for the time being, in France as in most western countries, it is the prioritization of human needs that justifies environmental protection. This is not a problem per se. Legal norms are conceived by humans and it is logical that they intend to protect human interests. However, such an approach creates the risk of less protection of other natural elements, others than human beings, such as animals, plants or ecosystems more broadly. This is why such an approach is based on a dichotomy between human and nature. This dichotomy is accompanied by an assumption of ontological superiority of human beings[9]. Said more simply, an anthropocentric approach may be problematic in so far as it perceives human beings as separate and more important of the rest of the world and protects the environment just to the extent necessary to the protection of human beings. This leads to a fragmented protection of nature, which is probably not the most effective way to deal with climate change, which is a global phenomenon in need of global and holistic[10] solutions.

[7] Ibid. p. 260.

[8] The example refers to the prohibition of short domestic flights when a direct rail connection alternative of less than 2.5 hours is possible. This measure is provided for by Decree n°2023-385 of 22 May 2023, in application of the Act "Climate and Resilience" of 2021. For more information, cf. https://www.service-public.fr/particuliers/actualites/A16193.

[9] Laffaille F., "Constitution éco-centrique et État social de droit. À propos du constitutionnalisme andin", R.F.D.C., 2019, vol. 118, no. 2, p. 333, online https://www.cairn.info/revue-francaise-de-droit-constitutionnel-2019-2-page-333.htm (retrieved on 25 February 2024).

[10] The holistic approach of climate protection implies that climate change be considered, on the one hand, as a phenomenon to be addressed in the same manner by every piece of legislation within an overall policy and, on the other hand, as a part of a greater whole of interdependent ecological challenges.

B. The institutional level

The second level is institutional. Following Victor Hugo who said that "form is the substance which rises to the surface", we could say that our institutional organization reflects ethical choices and vice-versa. In fact, western countries' institutions, generally based on election-driven models of representative democracy, have a rather shortsighted vision. Their members' principal concern is to take measures promoting human interests in a manner that will allow them to be popular and, thus, reelected[11]. This requires that the measures they take prove their effectiveness quickly, which is not always the case with measures concerning climate change. This shortsighted vision is incompatible with the long-term commitments imposed by the fight against climate change, which necessitate, as mentioned above, fundamental changes to our lifestyles. These changes may therefore prove to be very unpopular.

In sum, these substantial and institutional manifestations of the anthropocentric approach explain the State's inertia in the first place in matters of climate change. However, this situation is starting to evolve. This is precisely what results from recent developments in French caselaw concerning climate change. Nevertheless, even if there is an evolution through climate litigation, the anthropocentric bias is not completely abandoned. This results sometimes in problematic situations. A brief overview of French climate caselaw illustrates these observations.

II. The weaknesses of French climate litigation as a jurisdictional solution

Even if, for the time being, it is quite difficult to talk about climate caselaw given the casuistic character and limited number of cases, it is still possible to divide climate litigation in France into two major categories. The first one concerns omissions or inaction in order to deal with or to prevent climate change. On the contrary, the second one concerns positive actions that take place at the expense of the climate[12].

[11] Slautsky E., "Overcoming Short-Termism in Democratic Decision-Making in the Face of Climate Change: a Public Law Approach", French Yearbook of Public Law, 2023, no. 1, p. 253-269, online https://fypl.fr/wp-content/uploads/2023/10/FYPL_ISSUE1_2023.pdf (retrieved on 25 February 2024). For a critique of the short-sightedness of representative democracies based on election, cf. Rosanvallon P., "La myopie démocratique", Commentaire, 2010, vol. 131, no. 3, p. 599-604, online https://www.cairn.info/revue-commentaire-2010-3-page-599.htm (retrieved on 25 February 2024). For its consequences on ecological matters, cf. Bourg D. et al., "L'écologie dans la politique", Le Débat, 2019, no. 207, p. 18, online https://www.cairn.info/revue-le-debat-2019-5-page-4.htm (retrieved on 25 February 2024), and more generally Bourg D. and Whiteside K. H., Vers une démocratie écologique: le citoyen, le savant et le politique, Paris, Seuil, La République des idées, 2010.

[12] The presentation uses, in less detail, the distinction made by Lormeteau B. and Torre-Schaub M., "Du nouveau dans le contentieux climatique – Des réponses temporelles et plurielles à l'urgence climatique", op. cit., note 1, p. 257-274. The selection of cases cited below is based on their impact or their suitability for the demonstration of the defended thesis. Other cases exist, but they dit not have the same degree of impact. This applies, for example, to the decision of the French Constitutional Council concerning the a priori constitutional review of the Bill "Climate and Resilience", cf. Constitutional Council, 13 August 2021, n° 2021-825 DC, Loi portant lutte contre le dérèglement climatique et renforcement de la résilience face à ses effets. For an English abstract of this case, cf. https://climatecasechart.com/non-us-case/in-re-climate-resilience-bill/ and Bétaille J., "Climate litigation in France, a reflection of trends in environmental litigation", Elni Review, 2022, vol. 22, p. 64-65, online https://publications.ut-capitole.fr/id/eprint/46433/ (retrieved on 25 February 2024). For more information on the potential of constitutional norms in French climate litigation, cf. Savonitto F., "Les ressources constitutionnelles dans le contentieux administratif climatique", R.J.E., 2022, vol. 47, no. 4, p. 717-734, online https://www.cairn.info/revue-juridique-de-l-environnement-2022-4-page-717.htm (retrieved on 25 February 2024).

A. The cases of inaction

Inspired by the example of foreign cases, such as the famous Urgenda case in the Netherlands[13], climate litigation in France has emerged in 2019. It all started with two highly publicized cases concerning a general climate obligation. In essence, these cases concern an omission to take action in order to comply with commitments in fighting against climate change.

1. The case of the City of Grande Synthe

The first one is the case of the City of Grande Synthe[14], which gave place to three decisions, in 2020, 2021 and 2023. Briefly, the case was initiated in 2018 by a coastal city which is highly exposed to the consequences of climate change. The mayor of the city addressed three letters to the President of the Republic, the Prime Minister and the Minister of Ecological and Solidary Transition asking them the following: a) to take any useful measure to bend the curve of greenhouse gas emissions produced on national territory so as to comply with France's international and national commitments, b) to take all legislative or regulatory initiatives to "make climate priority mandatory" and to prohibit any measure likely to increase greenhouse gas emissions and, finally, c) to implement immediate measures to adapt to climate change in France[15].

From a procedural point of view, what happened was that the authorities to whom the mayor's letters were addressed did not give a response. Consequently, the City of Grande Synthe brought an action before the Council of State (Supreme Administrative Court) asking it to annul the implied decisions rejecting its requests and to enjoin the Prime Minister and the Minister of Ecological and Solidary Transition to adopt the abovementioned measures.

In its first decision, in November 2020, the Council of State considered that the second question, insofar as it consists in asking the Court to enjoin the government to prepare legislative initiatives, is a question concerning the relations between the executive and the legislative branch of government. Therefore, the Council of State considered that this question falls outside the scope of its jurisdiction and, thus, rejected it[16]. This was of no surprise.

[13] Urgenda Foundation v. State of the Netherlands. For an English abstract of the case, cf. https://climatecasechart.com/non-us-case/urgenda-foundation-v-kingdom-of-the-netherlands/.

[14] French Council of State, 19 November 2020, n° 427301; French Council of State, 1st July 2021, n° 427301; French Council of State, 10 May 2023, n° 467982. For an English abstract of the first two judgments, cf. https://climatecasechart.com/non-us-case/commune-de-grande-synthe-v-france/. For further analysis of the case, cf. Torre-Schaub M., "Dynamics, Prospects, and Trends in Climate Change Litigation Making Climate Change Emergency a Priority in France", German Law Journal, 2021, vol. 22, no. 8, p. 1455-1456, online https://www.cambridge.org/core/journals/german-law-journal/article/dynamics-prospects-and-trends-in-climate-change-litigation-making-climate-change-emergency-a-priority-in-france/FF7785F7ECFBC1B1767150EEE3CDCA1C (retrieved on 25 February 2024).

[15] French Council of State, 19 November 2020, n° 427301, point 1.

[16] Ibid, point 2.

On the contrary, what constituted the heart of the case were the considerations of the Council of State concerning the State's obligation to take measures reducing greenhouse gas emissions in order to comply with international and national commitments. In this regard, the Council of State considered the following: First of all, the Council referred to the international commitments stemming from the United Nations Framework Convention on Climate Change of 1989 and from the Paris Agreement of 2015. It then referred to EU and national law regarding climate change. The Court concluded that it results from all these legal texts that France assumed the responsibility to reduce its greenhouse gas emissions in order to deal with climate change, and that, in fact, public authorities took legislative measures in order to comply with their international obligations. However, the Court found that these measures were not applied correctly. Indeed, during the 2015-2018 period, France greatly exceeded the objectives it had set. France repeated this attitude the following years by postponing each time its objectives of reducing greenhouse gas emissions. Even if this attitude seemed enough to annul the implied administrative rejection of the petitioners' request, the Council of State reserved its judgement and asked for supplementary information before taking its final decision[17]. Finally, concerning the last request of the petitioners, the obligation to implement immediate measures to adapt to climate change in France, the Court considered that, to the extent that this obligation stems from the Paris Agreement, it does not have direct effect. It, therefore, rejected the petition in this regard[18].

A second decision followed some months later, in July 2021. This second decision was the final decision in which the Court reconsidered the omission of the French State to reduce its greenhouse gas emissions in view of further elements. The Court concluded that the National Low Carbon Strategy provided for by an administrative regulation needed to be complemented by supplementary measures in order to meet the objectives set by the French State. Therefore, the refusal of the defendant authorities to take these supplementary measures was illegal and then, annulled. The Council of State enjoined the Prime Minister to take all useful measures to bend the curve of greenhouse gas emissions produced on national territory so as to ensure its compatibility with the objectives of reducing greenhouse gas emissions. The State had until the end of March 2022 to take these measures.

In its third decision, in May 2023, the Council of State evaluated the action taken by the State in order to execute the previous decision. In this context, the Council observed that France's greenhouse gas emissions had reduced. However, the Council underlined that it was not certain that this reduction was the result of the measures adopted by the State. Indeed, it was more likely that this reduction was the result of decreased activity due to the Covid pandemic and the energy crisis linked to the war in Ukraine. In addition, the judges considered that there was no guarantee that the State would be able to continue the reduction of emissions following the 2030 target. In conclusion, the Council considered that its previous decision had not been executed. Therefore, it enjoined once again the State to take appropriate action and asked the Government to submit evidence proving the adequacy of the measures that would be adopted. However, as the previous ones, this decision did not provide for any financial penalty[19]. In conclusion, this first case concerned the pure omission of the French State to take appropriate action in order to comply with its obligations against climate change.

[17] Ibid, points 9-16.

[18] Ibid, point 18.

[19] For a critical analysis of the third judgment, cf. Torre-Schaub M., "Affaire Grande-Synthe : doit-on s'inquiéter pour l'avenir de la justice climatique en France ?", The Conversation, 11 June 2023, online https://theconversation.com/affaire-grande-synthe-doit-on-sinquieter-pour-lavenir-de-la-justice-climatique-en-france-207035 (retrieved on 25 February 2024).

2. *The "Case of the Century"*

By contrast, the second case, called "L'affaire du siècle"[20] (which can be translated into English as "The Case of the Century") went a step further as it concerned the responsibility of the State because of its inaction. More simply, here the State was accused of causing ecological damage (prejudice écologique) due to its omission to take appropriate measures. Ecological damage, which was a central notion in this case, is a form of damage provided for by the French Civil Code[21]. It is defined as "a non-negligible damage to the elements or functions of ecosystems or to the collective benefits derived by man from the environment"[22]. In other words, ecological damage is dissociated from human damage[23].

This second case started in 2019 and gave place to three decisions in February and October 2021 and in December 2023. In this case, which was initiated by four NGOs[24], the Administrative Tribunal of Paris (first instance Administrative Court) considered that the State was responsible of ecological damage because of its climate inaction since it had not implemented sufficient measures realizing its obligation of reduction of greenhouse gas emissions in accordance with its 2015-2018 carbon budget[25].

[20] Administrative Tribunal of Paris, 3 February 2021, n° 1904967, n° 1904968, n° 1904972 et n° 1904976/4-1; Administrative Tribunal of Paris, 14 October 2021, n° 1904967, n° 1904968, n° 1904972 et n° 1904976/4-1; Administrative Tribunal of Paris, 22 December 2023, n° 2321828/4-1. For an English abstract of the case, cf. https://climatecasechart.com/non-us-case/notre-affaire-a-tous-and-others-v-france/. For further analysis of the case, cf. Torre-Schaub M., "Dynamics, Prospects, and Trends in Climate Change Litigation Making Climate Change Emergency a Priority in France", op. cit. note 14, p. 1456-1458.

[21] Articles 1246 et s. of French Civil Code.

[22] Article 1247 of French Civil Code.

[23] Downs S., "Civil liability for climate change? The proposed tort in Smith v Fonterra with reference to France and the Netherlands", Review of European, Comparative & International Environmental Law, 4 February 2024, p. 5-9, online https://onlinelibrary.wiley.com/doi/abs/10.1111/reel.12532 (retrieved on 25 February 2024) ; Bétaille J., "Climate litigation in France, a reflection of trends in environmental litigation", op. cit. note 12, p. 66-67.

[24] The petitioners in this case were Oxfam France, Notre Affaire à Tous, Fondation pour la Nature et l'Homme (FNH) and Greenpeace France.

[25] Administrative Tribunal of Paris, 3 February 2021, op. cit., point 30. The Court considered that "the State must be seen as having ignored the first carbon budget (2015-2018) and thus not carried out the actions that it itself recognized as being likely to reduce greenhouse gas emissions".

However, the first two decisions on this case had a rather symbolic value since the recognition of State's responsibility was limited both in length and time[26]. On the one hand, these decisions gave a limited solution to the damage already caused to the climate[27]. More precisely, in the first decision, the Court explained that, according to the Civil Code, the reparation of ecological damage can be pecuniary only in the event of impossibility or insufficiency of reparation in kind. However, the Court considered that petitioners failed to prove the State's impossibility to repair in kind the ecological damage for which it was found responsible[28]. As a result, the Court, in its second decision, enjoined the State to take all useful measures likely to repair the damage and to prevent its aggravation[29]. This being the case, scholars consider that, even if the State takes measures to prevent further damage, the reparation of damage already caused is quite difficult, since only the "immediate withdrawal" of surplus emissions could allow a return to the *status quo ante*[30]. On the other hand, no penalty was provided against the State should it not comply with the Court's injunction. On this last aspect, according to the petitioner NGOs, the State has not done enough to remediate since then. This is the reason why the NGOs brought a new action on 14 June 2023, asking the Administrative Tribunal of Paris to enjoin the State to take appropriate measures or to pay a financial penalty of 1.1 billion Euros[31]. In fact, the petitioners alleged that the reduction of 2.7% of France's greenhouse gas emissions during last years was a pure coincidence (due to the Covid pandemic, the war in Ukraine, favorable meteorological conditions etc.) and not the result of a revisited climate policy. In its last decision on this case, the Administrative Tribunal of Paris rejected the allegations of the NGOs. It considered that the State, in accordance with the injunction given to it, had adopted measures likely to repair the ecological damage in question[32].

In sum, in these cases, the main question was whether the climate obligations provided for in the various legal texts have a real binding effect in France. The objective of this climate litigation was to move from what seemed to be a rather political commitment to a real, legally binding obligation[33].

[26] Lormeteau B. and Torre-Schaub M., "Du nouveau dans le contentieux climatique – Des réponses temporelles et plurielles à l'urgence climatique", op. cit. note 1, p. 264.

[27] Grandjean M., "« Nos maisons brûlent et le Gouvernement regarde toujours ailleurs » : éléments pour un bilan à propos de l'efficacité de la justice administrative en matière climatique", R.J.E., 2023, vol. 48, no. 1, p. 96 s, online https://www.cairn.info/revue-juridique-de-l-environnement-2023-1-page-87.htm (retrieved on 25 February 2024).

[28] Administrative Tribunal of Paris, 3 February 2021, op. cit., points 36-37.

[29] Administrative Tribunal of Paris, 14 October 2021, op. cit., point 13.

[30] Grandjean M., "« Nos maisons brûlent et le Gouvernement regarde toujours ailleurs » : éléments pour un bilan à propos de l'efficacité de la justice administrative en matière climatique", op. cit. note 27, p. 98 ; Bétaille J., "Le préjudice écologique à l'épreuve de l'Affaire du siècle", A.J.D.A., 2021, no. 38, p. 2228-2234.

[31] Administrative Tribunal of Paris, 22 December 2023, n° 2321828/4-1.

[32] Ibid, points 14-17.

[33] In this sense, J. Bétaille observes that the originality of climate litigation in France is "the establishment of a 'trajectory review' by the judge", Bétaille J., "Climate litigation in France, a reflection of trends in environmental litigation", op. cit. note 12, p. 63.

B. The cases of positive action

The second category entails cases of positive action, where, for example some infrastructure projects, concerning, most of the time, energy production, are developed despite their negative impact on climate or on the environment more generally.

In this regard, French caselaw could be characterized as fluctuant. On the one hand, some cases put an end to "climate-cide"[34] committed by positive action. This has been the case, for example, of a 2019 decision of the French Council of State regarding the exploitation of hydrocarbons[35]. In this case, a presidential decree provided for the prohibition of the extension of hydrocarbon mines concessions beyond 2040. This precise limitation was contested by the petitioner, who was a petroleum company. However, the Council of State rejected its petition considering that the State had taken this measure in accordance with its international obligations in matters of climate change. This decision shows that, in the case of hydrocarbons exploitation, if judges are not able to stop immediately any project responsible of "climate-cide", they are at least able to validate its restriction in time, once they have a legal basis to do so.

On the other hand, the situation becomes more complicated when a positive action, put into place in order to protect the climate, threatens other ecological aspects. A case concerning a wind energy project[36] illustrates this point. More precisely, a derogation from the regulations on the biodiversity protection had been accorded to allow the development of a wind energy project in a forest. The petitioners contested this derogation. However, the Administrative Court of Appeal considered that this derogation was justified by climate emergency. By taking this decision, the Court gives the impression that climate emergency and ecological emergency, i.e. the need to protect biodiversity, are two separate problems in need of separate solutions[37]. Therefore, based on an anthropocentric approach, the Court validated and, hence, perpetuated a fragmented point of view. Indeed, conservationists would argue that the goal of renewable sources of energy exploitation is not to keep our lifestyles unchanged at the expense of the rest of the world, but rather to bring these lifestyles into harmony with the capabilities of the planet, the so-called "planetary boundaries". So, climate emergency and ecological emergency should be taken into consideration simultaneously, as a whole.

[34] "Climaticide" projects can be defined as "those having negative effects on the atmosphere and the normal functioning of the climate system", Torre-Schaub M., "Dynamics, Prospects, and Trends in Climate Change Litigation Making Climate Change Emergency a Priority in France", op. cit. note 14, p. 1452.

[35] French Council of State, 18 December 2019, n° 421004, Société IPC Petroleum France SA. For an English abstract of the case, cf. https://climatecasechart.com/non-us-case/ipc-petroleum-france-sa-v-france/. Cf. also Lormeteau B. and Torre-Schaub M., "Du nouveau dans le contentieux climatique – Des réponses temporelles et plurielles à l'urgence climatique", op. cit. note 1, p. 267.

[36] Administrative Court of Appeal of Nantes (France), 5 March 2019, n° 17NT02791, 17NT02794, Société pour la protection des paysages et al v. SAS Les Moulins du Lohan. For an English abstract of the case, cf. https://climatecasechart.com/non-us-case/society-for-the-protection-of-landscapes-and-aesthetics-of-france-et-al-v-the-mills-of-lohan/.

[37] Lormeteau B. and Torre-Schaub M., "Du nouveau dans le contentieux climatique – Des réponses temporelles et plurielles à l'urgence climatique", op. cit. note 1, p. 267-268.

These examples clearly demonstrate the absence of a holistic approach of climate protection on the side of both initial decision-makers and judges. More precisely, due to the fragmented perception of ecological questions as a result of the anthropocentric foundations of our legal system, climate change is often addressed by initial decision-makers as a problem per se, separate from other ecological questions. In addition to that, courts are often deprived of the possibility of questioning this political choice. In fact, the comparison of the cases cited above shows that, even if in some of them French judges are inclined to recognize the climate emergency and even declare the State responsible of causing ecological damage in what could be a holistic point of view[38], in other cases French courts are not completely detached from the anthropocentric point of view of our western legal systems[39]. This is why, respecting a rather strong principle of separation of powers[40], courts enjoin the State to a certain attitude, but always within the limits of obligations already assumed by the State[41]. In other words, for the time being, courts do not create new obligations. So, if the objective is the creation of additional obligations that will facilitate the transition to a more holistic ecocentric[42] legal paradigm, it is necessary to explore alternative solutions, which would complement climate litigation. In fact, if climate litigation allows the recognition of the legally binding nature of climate obligations already assumed by the State and their application, it is not as appropriate when it comes to contest the general anthropocentric foundations of our legal order. Therefore, the paradigm shift implied by climate change tests the adequacy of traditional legal tools by showing their limits. This leads to the third part of this analysis: the question of the reasons why climate litigation has emerged, and the assertion made in the introduction that climate litigation can only be a part of the solution and probably not the most important one.

[38] Rombauts-Chabrol T., "L'émergence d'un contentieux holistique ?", R.J.E., 2022, vol. 47, no. 4, p. 735-746, online https://www.cairn.info/revue-juridique-de-l-environnement-2022-4-page-735.htm (retrieved on 25 February 2024).

[39] For an example and critique of administrative judges' formalistic approach based on the independence of legislations principle, cf. Bétaille J., "Climate litigation in France, a reflection of trends in environmental litigation", op. cit. note 12, p. 69-70.

[40] The fact that judges do not put into question normative choices based on the anthropocentric paradigm can be explained on two levels. On the one hand, there is a difficulty for French courts, even the Constitutional Council, to sanction legislative omissions, i.e. "insufficient action by the legislator to implement supralegislative objectives", Ibid. p. 67. On the other hand, in application of what could be considered a subsidiarity principle (called in French "théorie de la loi-écran"), administrative judges do not have the competence of exercising a constitutional review of regulatory measures when these measures are adopted pursuant to legislative measures. Said otherwise, administrative judges can exercise a constitutional review of regulatory measures only in the rare case where there is no interference of legislative measures (this could allow to set aside the independence of legislations principle. For further analysis of this possibility, cf. Ibid. p. 67-70). In all other cases, they can only control the compatibility between regulatory and legislative measures. However, in case of incompatibility, administrative judges tend to exercise a rather weak judicial review by letting the Government a large margin of appreciation as to the content of measures to be adopted.

[41] Rombauts-Chabrol T., "L'émergence d'un contentieux holistique ?", op. cit. note 38, p. 735-746.

[42] An ecocentric approach consists in protecting "threatened populations, species, habitats, and ecosystems wherever situated and irrespective of their use value or importance to humans", Eckersley R., Environmentalism and political theory: toward an ecocentric approach, London, UCL Press Limited, 2003, p. 46.

III. The need for extra-jurisdictional solutions

Climate litigation can be understood as a source of innovation exceeding the jurisdictional field. In this respect, civil society plays a fundamental role since most of the cases concerning climate change are initiated by civil society organizations. It is characteristic that in the FAQ section of the website dedicated to the "The Case of the Century", which is probably the most important case in this respect, the initiators of the movement justify their choice to go to courts as a "tool complementary to other forms of citizen action" [43]. In other words, they consider courts as a forum, where their voices can be heard and, what is more, where they can put under institutional pressure[44] the government's action or inaction regarding climate change. In this sense, it could be argued that climate litigation in France is strategic[45].

Nevertheless, although understandable, this choice can only be a part of the solution. Of course, citizens need forums where they can express their claims and control the public authorities' action or inaction. However, due to the extent of their competence and the need to respect the principle of separation of powers, courts are often ill-suited to provide for holistic solutions.

The fight against climate change is part of social matters which demand for structural changes and lead to the search for new forums[46].

[43] To the question "Why climate litigation?" ("Pourquoi un recours climatique ?"), the NGOs answer "Because through this litigation, we no longer remain spectators or claimants to the State. We are taking legal action so that an ecological standard is imposed in France on all political and economic decisions, and thus protects us from climate change. It is a complementary tool to other forms of citizen action: individual gestures at daily life, climate marches, voting…", online https://laffairedusiecle.net/faq/.

[44] Cf. Cournil C., Le Dylio A., and Mougeolle P., "13. Notre affaire à tous et autres c. l'État français (2019)", in Cournil C. (ed.), Les grandes affaires climatiques, DICE Éditions, 2020, p. 233, online http://books.openedition.org/dice/10943 (retrieved on 23 March 2024), stressing out that "the progress truly expected from the petition [in the "Case of the Century"] lies in the issuance of an injunction which would force the State to wage a truly effective fight against climate change" (our translation).

[45] Rombauts-Chabrol T., "L'émergence d'un contentieux holistique ?", op. cit. note 38, p. 735-746.

[46] These forums can be designated as "future-oriented institutions", Slautsky E., "Overcoming Short-Termism in Democratic Decision-Making in the Face of Climate Change: a Public Law Approach", op. cit. note 11, p. 257 et s. Their characteristic is that their configuration allows their members not to be preoccupied or biased by short-term considerations. For a critical overview of measures and institutional innovations implemented by the French government in order to deal with climate emergency, cf. Cournil C., "Le quinquennat de l'urgence climatique ? Retour critique sur les intentions et les actes du Président Macron", R.J.E., 2022, no. HS21, p. 167-186, online https://www.cairn.info/revue-juridique-de-l-environnement-2022-HS21-page-167.htm (retrieved on 23 March 2024).

This is what happened in France, where the fight against climate change led to the experiment of an institutional innovation, the Citizens' Convention on Climate[47]. In a few words, the Citizens' Convention on Climate has been the first experience of deliberative democracy at the national level in France. Inspired by foreign experiences of Citizens' Assemblies, especially in Ireland and Iceland, the Citizens' Convention on Climate was composed of 150 citizens, drown by lot, and tasked with making propositions addressing the following question: "How to reduce greenhouse gas emissions by at least 40% by 2030, in a spirit of social justice?"[48].

Even if the result of this experiment has been frustrating, because of its uncertain and mitigated outcome[49], this could be the start for an alternative institutional solution. It would give citizens the possibility to express their points of view a priori, in the moment of the elaboration of the law, through deliberative democracy mechanisms. A possible combination of this mechanism with participatory or direct democracy mechanisms, such as referendum, would allow citizens to influence or even to have a word on the elaboration and the adoption of legal norms concerning climate change. First of all, this could allow for more legitimacy concerning public decisions on climate change and possible better application of these decisions. Subsequently, courts could exercise a stronger judicial review and avoid a risk of breaching the principle of separation of powers. Indeed, if climate litigation cases should, nevertheless, come before the courts, the latter could rely on the high legitimacy of legal norms adopted through these new mechanisms and exercise a stronger judicial review.

These few elements and observations concerning climate litigation in France, its limits, and possible alternatives, do not mean that climate litigation is vain, but rather that it should be complemented by a broader substantial and institutional evolution.

[47] Slautsky E., "Overcoming Short-Termism in Democratic Decision-Making in the Face of Climate Change: a Public Law Approach", op. cit. note 11, p. 259-260. It is important to note that other forms of future-oriented institutions related to the question of climate change exist in France. This is, for example, the case of the High Council on Climate (Haut Conseil pour le Climat), Ibid. p. 261 et s., the Economic, Social and Environmental Council (Conseil économique, social et environnemental – CESE) and the General Council on Environment and Development (Conseil général de l'environnement et du développement durable – CGEDD). However, the composition and organization of these independent expert bodies, within the French legal order, is not as innovative as this of the CCC. This is the reason why the present article refers only to the CCC.

[48] This was the objective set by the Prime minister in its letter addressed on 2 July 2019 to the President of the Economic, Social and Environmental Council tasked with the organization of the Convention, online https://www.conventioncitoyennepourleclimat.fr/wp-content/uploads/2019/09/lettre-de-mission.pdf. For further information, cf. Hedary D., "The Citizens' Climate Convention: A new approach to participatory democracy, and its effectiveness on changing public policy", French Yearbook of Public Law, 2023, no. 1, p. 271-280, online https://fypl.fr/wp-content/uploads/2023/10/FYPL_ISSUE1_2023.pdf (retrieved on 25 February 2024).

[49] Torre-Schaub M., "Dynamics, Prospects, and Trends in Climate Change Litigation Making Climate Change Emergency a Priority in France", op. cit. note 14, p. 1447 ; Slautsky E., "Overcoming Short-Termism in Democratic Decision-Making in the Face of Climate Change: a Public Law Approach", op. cit. note 11, p. 260.

Students FEEDBACK FORM

" I REALLY LIKED THE DEBATE-LECTURES, ALSO THE PARLIAMENT VISIT AND IN GENERAL THE ORGANIZAITION WAS VERY GOOD ! "

"BEST BIP I'VE SEEN. THE MOOD WAS CASUAL AND PROFESSIONAL AT THE SAME TIME. LIKED ULB ATMOSPHERE."

" I LIKED A LOT THE GOOD VIBES DURING THE SESSION, I ALSO LIKED THE SUPERVISING STAFF WAY WORKING. ALL STAFF MEMEBERS GAVE US THE NECESSARY SUPPORT. THE WORKGROUP WAS AMAZING. "

" LOVED THE TOPIC, LOVED THE PEOPLE, LOVED THE PANELS ! I'M VERY GLAD I CAME AND WOULD GLADY DO ANOTHER CIVIS PROGRAMME. I REALLY APRECIATED THE EFFORT PUT INTO ORGANIZING THIS, AND WAS AMAZED BY THE LEVEL OF THE PRESENTERS INVOLVED."

"I REALLY ENJOYED THIS WEEK. EVEN IF IT WENT SO FAST. THANK YOU FOR EVERYTHING AND THE SUPPORT. PLEASE KEEP POSITIVING THESE SUMMER EXCHANGE AS IT IS THE ONLY WAY TO BUILD BRGIGES BETWEEN NATIONS."

" THE DISCUSSION PANELS WERE VERY INTERESTING AND EASIER TO FOLLOW DUE TO THEIR MORE INTERACTIVE NATURE. "

" MANY COMPLIMENTS TO THE ULB PROFESSOR. YOU ARE VERY NICE AND COMPETENT AND EMERGES HOW MUCH YOU ARE PASIONATE ABOUT YOUR WORK. THANK YOU SO MUCH ! "

PHOTO BOOK


TRIANGLE OF IMPOSSIBILITY
HEALTH
SOCIAL-DEMOCRATIC STATE
AUTHORITARIAN REGIME
FREEDOM
LIBERTARIAN STATE
ECONOMY


ACCOUNTABILITY MECHANISMS
IN THE ITALIAN PARLIAMENT


GREECE – Migration Crisis History I


GOVERNING IN TIMES OF CRISIS
ULB-CIVIS SUMMER SCHOOL 3-7 JULY 2023
CRISIS AND CIVIL DISOBEDIENCE


Political groups


C. HUGON
C. LANSSENS

CIVIS LETTER N° 2

CIVIS A European Civic University

ADDRESS:

CIVIS LETTER Charlotte LARGERON - Publications ILF - GERJC
(AMU CNRS UMR 7318 DICE)
FACULTÉ DE DROIT ET DE SCIENCE POLITIQUE
Aix Marseille Université - 3 Av. R. Schuman - 13628 Aix-en-Provence